ATTORNEYS' FEES IN SOCIAL SECURITY DISABILITY CASES

HEARING

BEFORE THE

SUBCOMMITTEE ON SOCIAL SECURITY

OF THE

COMMITTEE ON WAYS AND MEANS
HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

FIRST SESSION

MAY 13, 1987

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ATTORNEYS' FEES IN SOCIAL SECURITY DISABILITY CASES

WEDNESDAY, MAY 13, 1987

House of Representatives,
Committee on Ways and Means,
Subcommittee on Social Security,
Washington, DC.

The subcommittee met, pursuant to notice, at 9 a.m., in room B-318, Rayburn House Office Building, Hon. Andy Jacobs, Jr. (chairman of the subcommittee) presiding.

[The press release announcing the hearing and background material follow:]

FOR IMMEDIATE RELEASE
WEDNESDAY, APRIL 29, 1987

SUBCOMMITTEE ON SOCIAL SECURITY #4
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES
1102 LONGWORTH HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
TELEPHONE: (202) 225-3627

ANDY JACOBS, JR. (D., IND.), CHAIRMAN, SUBCOMMITTEE ON SOCIAL SECURITY, COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, ANNOUNCES A HEARING ON ATTORNEYS' FEES IN SOCIAL SECURITY DISABILITY CASES ON WEDNESDAY, MAY 13, 1987, AT 9:00 A.M. IN ROOM B-318 RAYBURN HOUSE OFFICE BUILDING

Andy Jacobs, Jr. (D., Ind.), Chairman of the Subcommittee on Social Security, Committee on Ways and Means, U.S. House of Representatives, today announced that the Subcommittee will conduct a hearing on attorneys' fees in social security disability cases. The hearing will examine the procedures the Social Security Administration (SSA) employs in awarding attorneys' fees, and review legislative and administrative recommendations for improving the process. The hearing will be held on Wednesday, May 13, 1987, in room B-318 Rayburn House Office Building, beginning at 9:00 a.m.

The Subcommittee will receive testimony from invited Administration witnesses, and interested public witnesses.

Background

The current system for provision of fees to attorneys who serve on behalf of social security disability claimants has become the subject of considerable debate over the last two years, particularly with respect to the size, timeliness, and consistency of fees awarded. On one hand, many attorneys have asserted that the fee approval process is slow, cumbersome, and unwieldy, and that the inability of attorneys to receive reasonable fees for their services in a timely fashion is a major disincentive to attorneys accepting business related to disability claims. If attorneys refuse to handle disability cases, claimants may be deprived of adequate legal counsel in pursuing their claims. On the other hand, the Inspector General of the Department of Health and Human Services has concluded that there are abuses in the attorneys' fee area, with overly generous awards provided too frequently. The Inspector General has recommended, and SSA has adopted, in part, more extensive controls in the fee approval system.

The hearing will focus on the competing claims made with respect to the provision of attorneys' fees, and will review alternative proposals to simplify the process and assure uniform, equitable, and timely awarding of fees.

DETAILS FOR SUBMISSION OF REQUESTS TO BE HEARD:

Requests to be heard must be made by telephone to Harriett Lawler [telephone (202) 225-3627] by the close of business Wednesday, May 6, 1987. In order to facilitate scheduling, requests should indicate the specific issues which the witness wishes to address and the relative priority of each issue if more than one issue is indicated. The request should be followed by a formal written request addressed to Joseph K. Dowley, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, room 1102 Longworth House Office Building, Washington, D.C. 20515. The Subcommittee will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning a scheduled appearance should be directed to the Subcommittee staff [(202) 225-9263].

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are requested to briefly summarize their written statements in no more than five minutes. THE FIVE-MINUTE RULE WILL BE STRICTLY APPLIED. The full statement will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question hearing witnesses, witnesses scheduled to appear before the Subcommittee are required to submit 100 copies of their prepared statements to the Subcommittee on Social Security office, room B-316 Rayburn House Office Building, at least 24 hours in advance of their scheduled appearances. Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENT IN LIEU OF PERSONAL APPEARANCE:

Persons submitting written statements in lieu of a personal appearance should submit six (6) copies of their statements by the close of business Wednesday, May 27, 1987, to Joseph K. Dowley, Chief Counsel, Committee on Ways and Means, U.S. House of Representatives, room 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing a written statement for the record of the printed hearing wish to have their statement distributed to the press and the interested public at the hearing, they may provide 75 additional copies for this purpose to the Subcommittee office, room B-316 Rayburn House Office Building, during the course of the public hearing.

SEE ENCLOSED FORMATTING REQUIREMENTS.

* * * * * * * * * * *

ANDY JACOBS, JR., INDIANA, CHAIRMAN
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KAREN P. WORTH, SUBCOMMITTEE MINORITY

May 12, 1987

MEMORANDUM

TO: Members of the Subcommittee on Social Security

FROM: Andy Jacobs, Jr.

SUBJECT: Subcommittee Hearing on Attorneys' Fees

The Subcommittee on Social Security will hold a hearing on problems in the process of awarding attorneys' fees in the social security program tomorrow, May 13, at 9:00 A.M. in room B-318 Rayburn House Office Building. Attached for your information are a background memo prepared by the staff of the Subcommittee, a copy of the recent HHS Inspector General's report on the subject, and a copy of an SSA memorandum outlining the agency's proposed changes in the attorneys' fees process.

SOCIAL SECURITY ATTORNEYS' FEES AWARD PROCESS
BACKGROUND

CURRENT LAW

Section 206 of the Social Security Act authorizes the Secretary of HHS to set the maximum fee any attorney may collect from a social security claimant as payment for services in representing the claimant in the adjudication of his benefit application. The Act specifies that fees must be "reasonable", but sets no dollar or percentage limit for the fee itself. However, the Act does provide that SSA may withhold up to 25 percent of a Title II claimant's past due benefits (i.e. benefits owed to the claimant because, for example, the onset of disability was found to be 12 months before the final decision of the ALJ), in order to insure a source of payment for the fees. If a higher fee is approved, the attorney must arrange to collect the excess from the claimant directly.

The structure for processing and approving attorneys' fees has been a decentralized one: the attorney submits a petition for a fee to the ALJ who decided the case, who may authorize payment of fees up to $3,000. Petitions for fees higher than $3,000 must be approved by the Regional Chief ALJ. Once the petition is approved, actual payment of the fee is made out of central office in Baltimore.

PAST CONCERNS ABOUT THE FEE PROCESS

The attorney fee process has been a source of complaint for several years, centered on the sometimes cumbersome and lengthy process for the actual award of the fee, and on the lack of consideration attorneys feel the administration gives to the contingency nature of representing disability claimants. Most recently, in March, 1986, the Subcommittee received testimony concerning problems in attorneys' fees. At that time, the Administration testified that the most pressing problem with respect to attorneys' fees was the workload for SSA in processing petitions and awards. The Administration testified that there was "room for improvement" in the process, and that a working group had been established to develop recommendations for making the process speedier and less cumbersome. No results from this work group have been communicated to the Subcommittee. Attorney testimony to the Subcommittee centered on the capriciousness of the current process, in which both inadequate and excessive fees can be awarded with little attention being paid to the actual hours worked or the contingent nature of the process.

CURRENT ISSUES

Report of the Inspector-General: In January, 1987, the HHS Inspector-General released a report on the attorney fee process which was highly critical of the current award procedure. The major points of the report are as follows:

-- The IG charged that ALJ's give only perfunctory review to fee petitions, and that a "significant number of claimants have paid what appeared to us to be excessive fees." The IG's standard for excessive is fees in excess of $75 per hour, which the report states is the limit on fee awards under the Equal Access to Justice Act. NOTE: This appears to be an incorrect assumption - while the statutory limit for EAJA was set in 1981 at $75 per hour, the statute also established a cost of living escalator for the fee limit. The current EAJA limit is around $90 per hour, with regional variations to take account of differentials in costs, according to information received by the Subcommittee.

-- The data in the report show that 55 percent of approved fees were for less than $75 per hour, 20 percent were for $75-$99 per hour, 21 percent were for $100-$199 per hour, 3 percent for $200-299 per hour and 1 percent for over $300 per hour. It should be noted that while the general statistics of an average hourly rate of $71 per hour and 55 percent of fees of less than $75 per hour were established from a sample of 2000 fee authorizations from December, 1984, the more detailed analysis for fees ranging from $75 to over $300 was done on a subsample of 214 of those authorizations.

-- The report charges that ALJ's pay little attention to the criteria set out in the regulations for determining the reasonableness of a fee petition (e.g. the complexity of the case, the level of skill required for adequate representation in the specific case, the actual amount of time spent, the results achieved by the attorney, the level of review to which the claim was pursued, and the amount of fee requested.) The ALJ's interviewed by the IG felt the regulations were too vague, and that it takes too much time to evaluate each fee according to those standards.

The report recommended to SSA that ALJ's not be allowed to award fees in excess of $75 per hour based on the hours claimed by the attorney, up to 25 percent of the past due benefits. The report recommends that the $75 per hour limit should be adjusted upward to take account of exceptional factors, such as complexity of the case, unavailability of attorneys, and insufficient past due benefits from which to withhold the award.

SSA Response to IG Report: The attached memo from the SSA Associate Commissioner for Hearings and Appeals sets out the revised procedures SSA proposes as a response to the IG's report.

-- Effective immediately (the memo is dated March 31, 1987), OHA will allow ALJ's to authorize fees only up to $1500; fees in excess of $1500 must be authorized by the Regional Chief ALJ. NOTE: This change was effected without changes in the current regulations governing attorney fee procedures.

-- Procedures for collecting data on fee petitions were established, most importantly a requirement that all ALJ's submit to the Regional ALJ Office copies of all fee petitions authorized each month.

QUESTIONS ON THE IG REPORT AND SSA RESPONSE

The Subcommittee has been inundated with complaints from the private social security disability bar, as well as from organizations representing the elderly, disabled and public interest bar about both the IG report and SSA's actions in response to it. The most important questions that have been raised are as follows:

Inadequacies of IG Report: Critics point out that the IG data reveal 75 percent of all fees to be less than $100 per hour, and that a breakdown according to the actual EAJA standard of $90 per hour would establish that most fee awards are under that amount. If excessive fees amount to a quarter or less of all awards, current procedures can be used to correct the problem. Furthermore, it is unclear from the IG report that the 214 fee authorizations on which the analysis was based were a representative sample of awards, particularly considering the highly individualistic process by which ALJ's authorize fees.

IG Recommendations Faulty: Critics state that while the IG report points out the cumbersome process of abiding by current regulations for evaluating fee petitions, the report's recommendation that fees be limited to $75 per hour does nothing to address the basic problem with the system - i.e. that it is time-consuming, difficult to administer, delays payment of fees for months in some cases, and results in unjustifiable variations in fee awards from one ALJ to another. The major problem cited by the Administration slightly over a year ago - the workload imposed on ALJ's by the fee approval process - is not even addressed by the IG recommendations.

SSA Action Should be in Regs: SSA's action in cutting in half the maximum allowable fee at the ALJ level without going through the regulatory procedure, with opportunity for public comment, seems directly contrary to the spirit of the 1984 Disability Reform Amendments which directed that disability policy changes be done only through the regulatory process as required under the APA. While the award of attorneys' fees is a procedural issue, such a change in the process unquestionably will have a major impact on beneficiaries as attorneys cease to take disability claims because they can't afford to do the work for the fee offered. Such a major change should only be done through the public notice and comment process; there is some indication that because of the precipitate nature of the steps taken by SSA, lawsuits against the new process will be filed.

SSA's Actions No Improvement: The new process sets the fee at no more than $1500 at the individual ALJ level, meaning that far more fee petitions will go to the Regional ALJ offices which are already understaffed and ill-equipped to review more petitions. Moreover, there is no recognition of the contingent nature of disability work: most attorneys take disability claims on a contingency only basis, and normally at a far lower rate than attorneys in other types of contingency cases who charge usually one-third to two-fifths of the award. This means that the attorney will only get paid for cases he or she actually wins, an average of 50 to 60 percent overall; by discouraging payment of fees over $1500, the administration will discourage attorneys from taking the cases in which they are most needed - the complex and time-consuming cases which the claimant has the least chance of managing adequately on his own.

SSA's Actions Hurt Claimants Not Attorneys: If attorneys cannot be adequately compensated on a reasonably timely basis for representing social security claimants, they will find other work to do. Claimants, on the other hand, will be left without representation in a very complex and difficult appeals process.

PROPOSED ACTIONS ON ATTORNEYS' FEES

NOSSCR Proposal: The organization representing social security claimants' attorneys proposed in 1986 that a standard fee of 25 percent of the past due benefits, up to some limit (e.g. $4000) be set, with opportunity for the claimant or the ALJ to object if that award appears to be too high.

H.R. 2312: Cong. Frank, along with 21 cosponsors, has introduced a bill to restore the $3,000 limit for fees, and to require a report from HHS recommending possible improvements in the fee procedure.

Chairman JACOBS. We are ready to start. This hearing by the Ways and Means Social Security Subcommittee is being conducted into the question of whether attorneys' fees under the Social Security claimant's situation are too high, too low, both or neither.

At this point we will insert Mr. Frank's statement for the record.

[The statement of Mr. Frank follows:]

STATEMENT OF HON. BARNEY FRANK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. Chairman, I would like to commend you for calling this hearing on Social Security attorney's fees today. You have consistently been a strong supporter of efforts to maintain a fair appeals process for Social Security claimants. The decision to convene today's hearing provides further demonstration of your commitment in this area, and I look forward to working with you and the other members of the Subcommittee.

Mr. Chairman, over the past few years, many of us in Congress have worked very hard to make sure that people entitled to Social Security benefits are able to receive those benefits with a minimum of bureaucracy and inconvenience. We have been successful to some extent in that effort, though further improvements are clearly necessary. Unfortunately, the Reagan administration has on a number of occasions made that task more difficult.

We are all familiar with the administration's very insensitive policy of several years ago under which thousands of deserving Social Security Disability Insurance recipients were thrown off the benefit rolls. Congress addressed this problem through legislation in 1984, though there are disturbing indications that similar difficulties may occur in the near future unless the administration revises its plans for further increases in SSDI workloads. I am hopeful that this matter will merit a separate hearing before this subcommittee later in this session of Congress. However, today's hearing addresses an issue which is, in some ways, perhaps more urgent than the SSDI workload problem.

One of the fundamental methods, under current law, by which Social Security claimants can preserve their rights and obtain their benefits is through the use of attorneys to represent them in administrative proceedings. Many of the thousands of SSDI recipients who lost their benefits when they were thrown off the rolls in 1983 were able to get those benefits restored with the assistance of lawyers. Even today, when the SSDI system is operating more fairly than in 1983, the use of attorneys is still a common and very useful practice (not only in SSDI cases, but also in SSI and other types of Social Security cases).

Regrettably, the administration has consistently taken positions which threaten the continued effective use of attorneys as legitimate representatives of claimants' rights in Social Security proceedings. Earlier attempts of this sort—including the Government Representative Program and the "own motion review" proposal—have now been scrapped. But, the new guidelines relating to attorneys' fees, which were issued by the Office of Hearings and Appeals on March 31, are more of the same.

I am concerned that this new policy, which limits attorney's fee awards by the presiding Administrative Law Judge to no more than $1500 (a 50 percent cut from the current level), will lead to a situation in which claimants will be unable to receive adequate legal representation. My office and the offices of many of my colleagues have been contacted by attorneys who indicate that, if the new guidelines remain in place for long, they will no longer take on Social Security cases and will switch to other categories of legal work. I have also heard from several ALJ's who have made the same point. Clearly, a sharp decline in the number of lawyers handling Social Security cases will make it increasingly difficult for claimants to obtain their rightful benefits. Thus, even if we are able to forestall the substantial increases in SSDI workloads which I already mentioned, there is a strong possibility that many disabled people in this country will be unable to get the benefits they need in order to meet their daily costs of living.

I am aware that the recent report by the Inspector General indicates that there are some problems in the current attorneys fee mechanism. If there are problems, I agree that we ought to take some corrective action. But, it makes no sense to me to adopt, on an interim basis, a policy which is such a sharp departure from past practice, while attempting to work out a long term solution to some of the problems pointed out by the Inspector General's report. Yet that is precisely what the March 31 OHA memorandum, which put in place these new guidelines, does.

Specifically, on page 4, the memorandum states that the OHA would like to see the followng objectives met by whatever new fee guidelines are adopted: that "the fee authorization process should produce fair, equitable, and consistent fees, which both protect the economic security interests of claimants and fairly compensate representatives for their services; and the fee authorization and payment processes would be simplified to ensure more timely reimbursement for quality services provided by representatives." These are laudable goals, but the memorandum goes on to say (on page 5): "in the meantime, as an *interim* measure until a new system is put into place" the new fee guidelines, which limit the presiding ALJ's award to $1500, will be followed.

Mr. Chairman, I fail to understand why, given the perfectly reasonable ojectives outlined in the memorandum, the Office of Hearings and Appeals found it necessary to adopt interim guidelines which violate those very objectives. The lower allowable ALJ award will mean more delays for attorneys and claimants alike, as well as less likelihood of full protection of claimants' "economic security" (since many of them will not be able to find attorneys to represent them).

In my opinion, it would make more sense for OHA to consult with the members of this subcommittee and other people with expertise in this area, including organizations which represent claimants and lawyers, and even, conceivably, some ALJ's, before attempting to put in place a new set of attorney's fees guidelines. Because of my belief that this issue needs to be looked at in a more deliberate way, and my concern that the ill-advised and rapidly instituted change which was imposed on March 31, may have a negative impact on the pool of lawyers willing to represent Social Security claimants (and by extension on the claimants themselves) I have introduced legislation which would nullify the March 31 order. This bill (which is designated H.R. 2312) would also impose a one year moratorium on the issuance for further regulations in this area pending a formal study of the issue by SSA and a report on that study to the Ways and Means and Finance Committees. The bill (the text of which I am attaching) currently has more than 20 co-sponsors.

Mr. Chairman, my primary concern in filing this legislation is the claimants. This is a group of people who, by and large, are not wealthy, are commonly confronting serious disabilities, and are often senior citizens who have worked and been productive citizens in their youth. I think it would be a cruel and unnecessary burden to impose on people who are already struggling in many cases to make ends meet a further obstacle to their ability to live their lives with a little dignity. I urge the subcommittee members to consider the adoption of legislation along the lines of H.R. 2312 before the current guidelines have unfortunate effect I fear they will.

Again, Mr. Chairman, I appreciate your offering me the opportunity to submit this statement.

(Original Signature of Member)

100th CONGRESS
1st SESSION

H.R. 2312

H.L.C.

To restore, on an interim basis, certain recently amended procedures for determining the maximum attorney's fees which may be charged for services performed before the Secretary of Health and Human Services under the Social Security Act and to require a report by the Secretary of Health and Human Services regarding possible improvements in such procedures.

IN THE HOUSE OF REPRESENTATIVES

__________, 19__

Mr. FRANK introduced the following bill; which was referred to the Committee on ____________________

A BILL

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. INTERIM RESTORATION OF PROCEDURES FOR ESTABLISHING MAXIMUM FEES FOR SERVICES RENDERED BY REPRESENTATIVES OF CLAIMANTS BEFORE THE SECRETARY OF HEALTH AND HUMAN SERVICES.

(a) Repeal of New Rules.--

(1) In General.--The provisions of the memorandum of the Associate Commissioner of Social Security, dated March 31, 1987 (relating to revised delegations of authority for administrative law judges to determine fees of representatives) which amend sections 1-220 through 1-226 of the Office of Hearings and Appeals Staff Guides and Programs Digest (commonly referred to, and hereinafter in this Act referred to, as the OHA Handbook) and Interim Circular No. 122 (relating to the determination authority regarding fees for representation of claimants) are hereby null and void.

(2) Effective Date.--Paragraph (1) shall apply with respect to determinations of fees made on or after March 31, 1987.

(b) Interim Restoration of Old Rules.--

(1) In General.--Determinations of fees for representatives of claimants made pursuant to section 206(a) of the Social Security Act on or after March 31, 1987, and before 90 days after the date of the submission of the report required under section 2 shall be made in

accordance with the provisions of--

(A) sections 1-220 through 1-226 of the OHA Handbook,

(B) Interim Circular No. 122 (referred to in subsection (a)(1)), and

(C) all other sections of the OHA Handbook to the extent they relate to fees for representation of claimants determined pursuant to such section 206(a),

as such provisions were in effect on March 30, 1987.

(2) RECONSIDERATION.--Any determination made by or under the Secretary of Health and Human Services on or after March 31, 1987, and on or before the date of the enactment of this Act which was made contrary to the requirements of paragraph (1) shall be immediately reconsidered in accordance with such requirements.

SEC. 2. STUDY RELATING TO POSSIBLE IMPROVEMENTS IN PROCEDURES FOR ESTABLISHING MAXIMUM FEES FOR SERVICES RENDERED BY REPRESENTATIVES OF CLAIMANTS BEFORE THE SECRETARY OF HEALTH AND HUMAN SERVICES.

(a) STUDY BY THE SECRETARY OF HEALTH AND HUMAN SERVICES.--As soon as possible after the date of the enactment of this Act, the Secretary of Health and Human Services shall undertake a thorough study with respect to the procedures for establishing maximum fees for services rendered by representatives of claimants before the Secretary pursuant to section 206(a) of the Social Security Act. In conducting the study, the Secretary shall solicit comments from attorneys who have served as such representatives.

(b) MATTERS TO BE STUDIED.--In carrying out the study provided for in this section, the Secretary of Health and Human Services shall address, analyze, and report specifically on--

(1) possible changes in the fee authorization and payment processes under section 206(a) of the Social Security Act which--

(A) would produce fees which are more fair, equitable, and consistent and which both protect the economic security interests of claimants and fairly compensate representatives for their services, and

(B) would simplify such processes to ensure more timely reimbursement for quality services provided by representatives, and

(2) any other matters which the Secretary considers would be relevant and useful to the Congress in considering legislation relating to such processes.

(c) REPORT.--Not later than 270 days after the date of the enactment of this Act, the Secretary of Health and Human Services shall submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report of the findings of the study provided for in this section, together with any recommendations the Secretary considers appropriate.

Chairman JACOBS. Our first witness today is our colleague, the Honorable Robert Wise of Charleston, W. Va. Let the record show Mr. Wise was up early this morning. His activities up to now have been strenuous. I think that I saw someone who looks very much like him down in the House gymnasium not 20 minutes ago. I am sure it was not he. He must have been preparing his testimony.

Mr. Wise, you can proceed in your own manner.

STATEMENT OF HON. ROBERT E. WISE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WEST VIRGINIA

Mr. WISE. Thank you very much, Mr. Chairman. One is kind of at a loss for words after that introduction.

I think this is a very timely hearing, and I appreciate the chance to be here. I would also like to extend my appreciation to the subcommittee for giving Garth Atkins, an attorney from Charleston, an opportunity also to testify. I had asked the committee if they would hear testimony from our area because we think that we are being severely affected by the ramifications of the Social Security decisions. Mr. Atkins practices Social Security law, and I think is one well versed to outline what the potential problems are.

Let me say, so that it is clear for the record, I did not practice Social Security law when I was practicing law. I am not sure what kind of law I practiced, quite frankly, judging by my income statement. But at any rate, Social Security was not a part of it. One reason was because it was my observation you had to carry a large number of files in order to be able to accomplish anything, in order to be able to gain any kind of return that could justify the expense, and also it was a very frustrating process.

Now add to that the proposals by the Social Security Administration, and what I fear is that there will be nobody practicing Social Security disability law very shortly in the West Virginia area.

We take from the example of the black lung provisions in which it has become very, very difficult for a lawyer representing a Federal black lung claimant to recover anything. The result has been in just a short period of time where I think there were 10 law firms or practitioners in the area of black lung that I could happily recommend constituents to. What we see now is that there may be one or two at the most practicing in that area of the law.

Now, I am not here to argue the brief for lawyers. Lawyers do a pretty good job on themselves. But my concern, Mr. Chairman, is that the statistics are very clear that if you do not have a lawyer in this game you are probably not going to succeed. The Social Security Administration Legal Society will produce statistics, I believe, that will show that only 36 percent of claimants who appeal without a lawyer will be successful; while 60 percent who use a lawyer will be successful.

We handle, according to the House Administration Committee in my office, one of the largest case loads in the U.S. House of Representatives in overall personal problems, in which Social Security disability is a large portion of that case load. What we see is very clear: If you do not have a lawyer, you are not going to score. You are going to be turned down, most likely, at the first level; probably at the ALJ level, and then you have got a real tough time proving your case in front of the Benefits Review Board.

So we would argue that it is not a case of trying to make things easier for lawyers, but it is a case of making sure that the constituents are able to receive the best possible representation. I wish it were not so. Many constituents come to me and say, "But, Bob, it is not fair that I should have to pay 25 percent for a lawyer for a disability that I suffered and they did not." And they are absolutely correct. But I know what the realities of the system are, and the realities of the system are you are going to need trained professional help in order to go in front of that ALJ, in order to prepare your medical testimony, in order to be able to overcome what seems to be sometimes a rough presumption that you are not disabled.

So I would hope that this hearing would call attention to that. The proposal, for instance, to drop from $3,000 to $1,500 the amount that would not be subject to review, I think will greatly constrict those lawyers who feel they want to practice Social Security law, and in turn will restrict the ability of constituents to get legal representation.

There is enough of a hurdle that one has to jump in going through the Social Security disability system. Certainly, this Ways and Means Committee is no stranger to that, having enacted reform legislation only a couple of years ago in response to some of the clear abuses of the system coming from the Social Security Administration. But now it seems like we are being faced with another set of hurdles; that is, that the people who need legal representation the most are going to find there is no legal representation available. That is because of the pressures being put upon the legal profession by the Social Security Administration.

I would request permission to enter my entire statement in the record. I have spoken off the cuff, and I would be happy to answer any questions.

Thank you.

Chairman JACOBS. Is there any objection to the statement being placed in the record?

[No response.]

Chairman JACOBS. So ordered.

[The statement of Mr. Wise follows:]

OPENING STATEMENT
CONGRESSMAN BOB WISE

HEARING ON LAWYERS FEES IN SOCIAL SECURITY DISABILITY CASES WAYS AND MEANS SUBCOMMITTEE ON SOCIAL SECURITY

May 13, 1987

MR. CHAIRMAN: I am grateful for the opportunity this morning to testify on this important issue along with a fellow attorney, Mr. Edward Atkins from Charleston. I understand that there have been problems with the attorney's fee system for years, and that in past instances of rule changes, the response by attorneys was so strong that proposed regulations were withdrawn. The new changes, outlined in an internal memorandum at the Social Security Administration, have restricted the chance for public comment. For this reason, I feel this hearing is very timely and allows me the opportunity to present the problems faced by attorneys in my district and assist in finding a suitable compromise.

If I may, I would like to briefly summarize the present reimbursement system and the proposed changes outlined in the Social Security Administration's memorandum. Currently, 25% of past-due benefits are withheld for payment of attorney's fees in Social Security disability cases. Detailed petitions for payment are submitted by the attorney which are then reviewed by the Administrative Law Judge who heard the case. This judge has not only the written listing of hours and fees on which to base his fee judgment, but he has witnessed the hearing and is personally familiar with the effort and degree of difficulty of the case. The present "ceiling" for payments authorized by the Administrative Law Judge is $3,000. Petitions for fees higher that $3,000 must be reviewed by a Regional Chief ALJ for approval.

How do the present proposals change this system? The new system, outlined in the SSA memorandum, recommends that the ceiling of $3,000 for fees be reduced to half that amount, or $1,500. In addition, fees are not to exceed a rate of $75 an hour. Petitions for higher fees, those above $1,500 would have to be submitted to the office of the Regional Chief ALJ. These fee determinations would then be decided by a non-attorney adjudicator who was not present at the proceedings.

The current system of attorneys fees as provided in the Social Security Act was clearly designed to aid the claimant at all levels. In the fee settlement process, the claimant has the right to be fully involved in setting the fees, and even after the fees have been set, the claimant can appeal that decision. The provision of withholding 25% of past-due benefits not only ensured that claimants could afford to obtain competent private counsel, but it helped to ensure that a pool of willing, competent attorneys was maintained.

I have no doubt that the proposed reforms were once again designed with the beneficiary's interest in mind. Unfortunately, I am afraid that these changes will have the opposite effect of the original intention in that they will significantly reduce the number of attorneys willing to accept Social Security cases. In the past three months, I have received letters from attorneys and law firms in my district expressing concern about fee regulation changes. For most of these firms, further restrictions in setting fees would force them to either drastically reduce the number of Social Security cases they accept, or discontinue their practice in this area altogether. In such a case, claimants would no longer be able to obtain legal representation and thereby risk losing their benefits.

Why would further fee regulations force law firms to curtail their acceptance of cases? A simple look at the past regulation changes in the area of federal Black Lung claims shows that their reductions are justified. Most of the attorneys I have heard from have been handling Federal Black Lung claims since the early 1970's when there were many attorneys willing to take these cases. Over the past years, however, the approval rates for Black Lung claims have fallen drastically and the mechanisms for obtaining payments have become more and more complicated and time-consuming. As a result, three firms have informed me that they will no longer be accepting Black Lung cases, and are being forced to turn away large number of claimants. Without adequate representation, these people face a substantially reduced chance of obtaining benefits.

It appears that similar circumstances could occur in Social Security cases should further fee restrictions be enforced. At present, it has been found that with representation, Social Security claimants have a 60% chance of success as compared to only a 36% success rate without an attorney. As long as there exists such a disparity in success rates, it is imperative that we work to maintain these services for claimants.

We have all at one time been faced with figuring out the details of complicated regulations and eligibility requirements for various programs. As a state with one of the highest caseloads in the nation, I hear from many constituents who are simply unable to determine under which category they are eligible for benefits. Filing under the wrong requirements may mean months of useless work with the final result of the claimant being denied benefits. Without the assistance of lawyers who specialize in this area, claimants who indeed meet eligibility requirements may be passed up for benefits. One example related to me by an attorney from this area describes a disabled coal miner who suffers from functional illiteracy. This factor alone would qualify the claimant for benefits, but on his own, the claimant would not know enough to inform Social Security of this handicap and Social Security would generally not make an effort to find out such information.

As long as the facts reflect the need for adequate legal representation, we must continue to provide this assistance for claimants. This means maintaining a pool of competent attorneys who can continue to represent their Social Security clients at a reasonable rate commensurate with their services. As I have noted, past experience in West Virginia has proven that restrictive fee regulations and cumbersome payment mechanisms drastically reduce the likelihood that firms will be able to continue to service these claimants. We must work together to arrive at an equitable solution that protects all the interests of the claimant.

Chairman **Jacobs**. Mr. Archer.

Mr. **Archer**. Thank you, Mr. Chairman. I have no questions.

Chairman **Jacobs**. I suppose the administration is here to speak for itself, but prices are not going down, are they? I mean, how do you figure the change from $3,000 to $1,500?

Mr. **Wise**. I am not sure. On the surface it looks good. We will hold lawyers to a tighter scrutiny. But the reality is that there will not be any lawyers practicing Social Security law.

And, Mr. Chairman, while I recognize that black lung and Social Security disability are two different areas of the law with a different fee schedule, I can see some disturbing parallels here, because we have already seen this happen in the black lung problem.

What happens is when you really squeeze down hard and you force all petitions for fees to be passed through a rigorous review process, you are months getting them back where you were only weeks before. What happens is that after awhile a lawyer—particularly one who operates a marginal law practice, which I have some experience in—says, "I cannot afford to handle these anymore." And with the exception of one fellow I know who is probably one of the forerunners in practicing computer law, dealing with thousands of black lung files, I do not know any lawyer now in West Virginia that will happily take on new cases.

In fact, when constituents would ask us for a list of those who would be willing to take their black lung case, what we have seen is, as I said, where we used to give them a list of ten lawyers that we knew would handle black lung cases, we have now had, I believe, eight of those lawyers tell us to take their names off the list.

The result is, of course, that the black lung victim, who was having enough of a time waiting four to seven years to have his case adjudicated, is now left totally out in the cold.

I use that as an example of what I think is going to happen in Social Security. It is still too new. In talking with Mr. Atkins, he says that some lawyers are taking a wait-and-see attitude. But we see the same disturbing pattern emerging again. Once again, those least able to go through the system are going to find themselves without any assistance at all.

Chairman **Jacobs**. Thank you very much, Mr. Wise, for your contribution to the record.

Mr. **Wise**. Thank you very much.

Chairman **Jacobs**. The cochairman of the committee may have an opening statement. Mr. Archer?

Mr. **Archer**. Mr. Chairman, thank you. I do have a brief opening statement I would like to make. I appreciate your calling this hearing on the subject of attorneys' fees. I know you remember, as I do, that this was one of the issues about which we heard testimony in March a year ago.

It is apparent from the subsequent January 1987 report from the Office of the Inspector General, and from the outcry from attorneys directed at the SSA's preliminary response to that report, the problem has not diminished. I understand that SSA will be presenting for our consideration regulatory proposals to streamline the attorney fee petition process.

Clearly, if we are to retain the review process, improvements are essential. Perhaps it is useful to consider the legislative history of the current statute. The Secretary was required by the 1939 amendments to prescribe rules and regulations, including maximum fees, but only for representatives in court-rendered judgments.

The current 25-percent withholding in the attorney fee petition process, which applies to cases in the administrative appeals process, were introduced in 1965. Clearly, a crisis in the continuing disability program contributed to an increase in the volume of attorney fee petitions and highlighted the problems in that process.

It is worth noting that in 1982 the administration proposed to Congress that the withholding and petition review process be rescinded, and that attorneys' fees be subject to direct marketplace negotiations. Those proposals met with strenuous objections from attorneys who wanted SSA to withhold benefits as a way of ensuring legal representation and advocacy groups who were concerned about unregulated fees.

These protests were successful, and Congress has continued to mandate the withholding of 25 percent of past-due benefits and the attorney fee petition.

I think the broader issue of this hearing is whether in today's more litigious and sophisticated society we in the Congress still want SSA to review and evaluate attorneys' fees. If that procedure continues to be essential, then are the administration's proposed regulatory changes responsive to the complaints we have heard?

So I would ask that witnesses today address not only the problems of the current process, but also the overall need for withholding and review of attorney fee petitions.

Finally, judging from my constituent correspondence and calls, most attorneys argue that the current method of payment does not recognize the widespread use of contingency fees. Contingency fees, which result at times in higher attorneys' fees than can be documented for an individual claimant, permit an attorney to offer his or her services to other claimants who may be denied.

The bottom line is whether or not the trust fund moneys, which are awarded to some beneficiaries primarily because of effective legal representation, should subsidize the appeals of those who fail to qualify. This is a troublesome issue, and one I would ask our witnesses to consider.

So, Mr. Chairman, I look forward to the testimony today from the witnesses and, again, compliment you on scheduling these hearings. I hope we can develop, in the Congress, a responsive policy.

Chairman JACOBS. Thank you.

Our next scheduled witness is Tom Roslewicz from the Department of Health and Human Services, Assistant Inspector General. Mr. Roslewicz is not a stranger to Capitol Hill.

You are very welcome, Tom. Please proceed in your own fashion.

STATEMENT OF THOMAS D. ROSLEWICZ, ASSISTANT INSPECTOR GENERAL FOR AUDIT, DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY EMIL T. MALLEK, JR., AUDIT MANAGER

Mr. ROSLEWICZ. Thank you, Mr. Jacobs, Mr. Archer.

I am Tom Roslewicz, the Assistant Inspector General for Audit, Department of Health and Human Services. I have here with me today Emil Mallek, who is the audit manager on the audit report that we will be discussing.

I am pleased to be here today to discuss the attorney fee approval process which the Social Security Administration uses in awarding legal fees to attorneys who represent claimants in administrative appeals. Specifically, I will be discussing the work of our office in this area, which generated an audit report entitled "Improvements needed in attorney fee processes could save beneficiaries millions."

I would like to submit a copy of that report for the record as well as my full statement.

Chairman JACOBS. Right.

Mr. ROSLEWICZ. In our review, we examined and analyzed attorney fee petitions. We also studied SSA's internal reviews of fee approval processes. We conducted a number of interviews with ALJs. The objective of our review was to determine whether regulatory procedures and ALJ approval practices were adequate to ensure that reasonable attorney fees were set in cases heard before the ALJs.

Our review focused on a randomly selected two percent sample of attorney fee requests approved in 1984 for representation at the ALJ hearings. The sample approximated 2,000 claims at about $2.3 million. The examination demonstrated that ALJs were generally not evaluating attorney fee petitions in accordance with the regulations.

ALJs indicated that, for the most part, they were giving perfunctory approval to the attorney-client contingency fee agreements for three reasons: First, they see their primary responsibility as determining the actual merits of the case and not a review of the arrangement between the attorney and client. Second, the regulatory criteria for evaluating fee petitions are vague, time-consuming, and generally ineffective. Third, they are overworked.

Contingency fees are a common basis for compensating attorneys in court and administration actions involving monetary awards. However, this appears to be in conflict with the requirement of the Social Security Act to assign a reasonable fee on a case-by-case basis. Consequently, reliance on contingency fee arrangements has resulted in a significant number of claimants paying what appear to us to be unwarranted fees for actions to receive government benefits.

Examples we encountered included—and I will go through two examples, but there are more referred to in our audit report: A 52-year-old man with severe back pain was awarded past-due benefits of $10,887. The ALJ authorized the attorney's fee of $2,772, which was taken from the award. The attorney worked on this case for only 7½ hours. The hourly equivalent of the fee was $375.

In another case, a 57-year-old man with severe back pain was awarded $14,076. In this instance, the ALJ approved the requested fee of $3,000 for 6 hours of work, an hourly equivalent of $500.

Approximately 55 percent of all fee determinations by ALJs were at $75 per hour or less. Seventy-five percent were under $100 per hour. Ninety-two percent were under $150 per hour. Eight percent, however, were more than double the $75 hour rate that Congress set under the Equal Access to Justice Act as the limit the government is willing to pay for attorney fees.

To ensure that claimants are better protected from unwarranted charges by attorneys, more effective methods for evaluating fee petitions are necessary. Procedures must employ simple and objective criteria which can easily and consistently be applied by ALJs, yet contain adequate safeguards to prevent abusive fee practices.

We would recommend that current regulations be revised so as to consider as reasonable fees that are the lesser of 25 percent of the past-due benefits awarded, or $75 per hour. The limit should permit adjustment for some exceptions, such as limited availability of qualified attorneys or extreme complexities of a case warranting special legal skills which could be developed and defined by the public rulemaking process. This recommendation, which combines the ease of application of the contingency fee with the protection of an hourly rate limit, appears to be the optimal solution.

Secondly, if an acceptable formulated solution could be developed in place of the current complex fee determination process, we would support consideration of relieving ALJs of the burdens associated with the direct fee determination process.

Finally, Congress may wish to reexamine the process whereby the Government first intercedes by establishing the eligibility of a beneficiary for benefits and then assuming the role of a collection agent on behalf of the attorney for fees which reduce the amount of money to be retained by the beneficiary.

This concludes my testimony, Mr. Chairman. We will be pleased to answer any questions.

[The statement of Mr. Roslewicz and report referred to follow:]

TESTIMONY
OF
THOMAS D. ROSLEWICZ
ASSISTANT INSPECTOR GENERAL FOR AUDIT
DEPARTMENT OF HEALTH AND HUMAN SERVICES

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE. I AM THOMAS ROSLEWICZ, ASSISTANT INSPECTOR GENERAL FOR AUDIT, DEPARTMENT OF HEALTH AND HUMAN SERVICES. I AM PLEASED TO BE HERE TODAY TO DISCUSS THE ATTORNEY FEE APPROVAL PROCESS WHICH THE SOCIAL SECURITY ADMINISTRATION USES IN AWARDING LEGAL FEES TO ATTORNEYS WHO REPRESENT CLAIMANTS IN ADMINISTRATIVE APPEALS. SPECIFICALLY, I WILL DISCUSS THE WORK OF OUR OFFICE IN THIS AREA, WHICH GENERATED AN AUDIT REPORT ENTITLED IMPROVEMENTS NEEDED IN ATTORNEY FEE PROCESS COULD SAVE BENEFICIARIES MILLIONS.

BACKGROUND

THE SOCIAL SECURITY ADMINISTRATION ADMINISTERS BENEFIT PAYMENTS UNDER THE OLD AGE, SURVIVORS AND DISABILITY INSURANCE AND OTHER INCOME MAINTENANCE PROGRAMS. PERSONS WHO ARE DENIED BENEFITS OR ARE TERMINATED FROM BENEFIT ROLLS BY SSA CAN APPEAL SSA'S DECISIONS. APPEALED DECISIONS ARE GENERALLY LIMITED TO DISABILITY CASES. THERE ARE SEVERAL LEVELS OF ADMINISTRATIVE APPEAL PRIOR TO JUDICIAL REVIEW. AT THE ADMINISTRATIVE LAW JUDGE (ALJ) LEVEL, ABOUT 65 PERCENT OF SUCH CLAIMANTS ARE REPRESENTED BY AN ATTORNEY. THE REMAINDER ARE SELF-REPRESENTED OR REPRESENTED BY A NON-ATTORNEY, USUALLY A FRIEND OR RELATIVE. ALJ HEARINGS ARE NONADVERSARIAL IN NATURE, AND THE GOVERNMENT'S POSITION IS NOT REPRESENTED BY COUNSEL. CONSEQUENTLY, THE ALJ ACTS SORT OF AN OMBUDSMAN WORKING TOWARDS THE BEST INTERESTS OF BOTH PARTIES WITHIN THE CONTEXT OF PROGRAM REGULATIONS.

IN AMENDING THE SOCIAL SECURITY ACT, CONGRESS INTENDED TO BALANCE THE NEED TO PROTECT CLAIMANTS FROM EXCESSIVE ATTORNEY FEES AGAINST THE NEED TO ENSURE THAT ATTORNEYS RECEIVE REASONABLE COMPENSATION FOR THEIR SERVICES. THUS, SECTION 206(a) OF THE ACT REQUIRES THE SECRETARY IN EACH CASE WHERE THE DETERMINATION IS FAVORABLE TO THE CLAIMANT, AND THAT CLAIMANT IS REPRESENTED BY AN ATTORNEY, TO SET A REASONABLE FEE AS COMPENSATION FOR THE

ATTORNEY'S SERVICES. ALTHOUGH NOT SPECIFIED, THE ACT HAS BEEN INTERPRETED TO ALSO ALLOW SSA, WHEN PETITIONED, TO SET REASONABLE FEES IN CASES WHERE THE FINDINGS ARE UNFAVORABLE TO CLAIMANTS.

THE ACT ALLOWS THE SECRETARY TO PRESCRIBE, BY RULES AND REGULATIONS, MAXIMUM FEES FOR ATTORNEY SERVICES. IN TURN, THE SECRETARY HAS ESTABLISHED REGULATIONS SETTING OUT CRITERIA FOR JUDGING THE REASONABLENESS OF FEE REQUESTS; HOWEVER, NO REGULATIONS WERE ESTABLISHED FOR SETTING MAXIMUM FEES. REGULATIONS ALSO REQUIRE SSA TO ACT AS COLLECTION AGENT FOR THE ATTORNEYS BY WITHHOLDING PART OF THE BENEFICIARY'S PAST DUE BENEFITS FOR PAYMENT BY SSA DIRECTLY TO THE ATTORNEY. THE WITHHELD AMOUNT IS REQUIRED TO BE THE SMALLER OF 25 PERCENT OF PAST DUE BENEFITS, THE AMOUNT SET BY THE ALJ, OR THE AMOUNT AGREED UPON BY THE ATTORNEY AND THE CLAIMANT. THE 25 PERCENT LIMITATION DOES NOT APPLY TO FEES BUT ONLY TO THE AMOUNT WITHHELD. FEES CAN EXCEED 25 PERCENT OF PAST DUE BENEFITS IF DEEMED TO BE REASONABLE.

FEE PETITIONS PRESENTED BY ATTORNEYS ARE EVALUATED FOR REASONABLENESS BY ALJS USING CRITERIA ESTABLISHED BY REGULATION. ALJS ARE TO CONSIDER, WHEN MAKING THEIR EVALUATIONS, THE PURPOSE OF THE SOCIAL SECURITY PROGRAMS AS WELL AS THE:

- EXTENT AND TYPE OF SERVICES THE REPRESENTATIVE PERFORMED;

- COMPLEXITY OF THE CASE;

- LEVEL OF SKILL AND COMPETENCE REQUIRED OF THE REPRESENTATIVE IN GIVING THE SERVICE;

- AMOUNT OF TIME THE REPRESENTATIVE SPENT ON THE CASE;

- RESULTS THE REPRESENTATIVE ACHIEVED;

- O LEVEL OF REVIEW TO WHICH THE CLAIM WAS TAKEN AND THE LEVEL OF REVIEW AT WHICH THE REPRESENTATIVE BECAME THE CLAIMANT'S REPRESENTATIVE; AND

- O AMOUNT OF FEE THE REPRESENTATIVE REQUESTS FOR THE SERVICE.

THE PURPOSE OF SOCIAL SECURITY PROGRAMS IS TO PROVIDE A MEASURE OF ECONOMIC SECURITY FOR BENEFICIARIES. IN EVALUATING FEES, WHICH IS DONE ON A CASE-BY-CASE BASIS, THE EFFECT OF THE REQUESTED FEE ON THE BENEFICIARY'S ECONOMIC SECURITY, IS TO BE WEIGHED ALONG WITH THE REGULATORY CRITERIA.

AT THE TIME OF OUR REPORT, ALJS HAD THE AUTHORITY TO APPROVE AN ATTORNEY'S FEE REQUEST PROVIDED THAT THE FEE DID NOT EXCEED $3,000. ABOVE THAT AMOUNT, FEE REQUESTS HAD TO BE APPROVED BY THE REGIONAL ALJS. APPROXIMATELY 95 PERCENT OF THE FEES REQUESTED FOR REPRESENTATION AT THE HEARING LEVEL WERE BELOW THE $3,000 LIMIT. SINCE OUR REPORT, THIS AUTHORITY LIMIT HAS BEEN REVISED DOWNWARD TO $1,500.

ALJS ARE LOCATED IN ABOUT 135 FIELD OFFICES. IN 1984, THEY APPROVED ABOUT 105,000 ATTORNEY FEE REQUESTS FOR REPRESENTING CLAIMANTS AT ALJ LEVEL HEARINGS. APPROVED ATTORNEY FEES APPROXIMATED $120 MILLION OF WHICH $100 MILLION PERTAINED TO THE OLD AGE, SURVIVORS AND DISABILITY INSURANCE (OASDI) PROGRAMS. THE REMAINDER PERTAINED TO APPEALS UNDER THE SUPPLEMENTAL SECURITY INCOME (SSI), PART B BLACK LUNG AND HEALTH INSURANCE PROGRAMS. FEES IN 1984 AVERAGED $1,150 PER CASE VS $1,469 IN 1986. FEES HAVE INCREASED 28 PERCENT ALTHOUGH THE NUMBER OF FEE REQUESTS HAS DECREASED BY 41 PERCENT (DOWN FROM 105,000 IN 1984 TO 61,500 IN 1986).

DURING RECENT YEARS, SSA HAS ATTEMPTED TO AMEND THE SOCIAL SECURITY ACT TO RELIEVE IT FROM THE REQUIREMENTS TO SET REASONABLE FEES AND TO WITHHOLD FEES FROM PAST DUE BENEFITS OF SUCCESSFUL APPELLANTS. SSA CITES HEAVY WORKLOADS, SCARCE STAFF

RESOURCES AND THE COST OF ADMINISTRATION AS REASONS FOR ITS DESIRE TO MODIFY THE PRESENT REQUIREMENTS. HOWEVER, THE NEED TO PROTECT CLAIMANTS FROM EXCESSIVE AND UNREASONABLE FEES HAS BECOME A MAJOR UNDERLYING REASON TO RESTRUCTURE THE ALJ PROCESS FOR AWARDING ATTORNEY FEES. INTERNAL ADMINISTRATIVE EFFORTS TO DEVELOP ALTERNATIVES WHICH WOULD LESSEN THE BURDEN HAVE NOT TO DATE YIELDED A SATISFACTORY SUBSTITUTE FOR THE PRESENT METHOD OF SETTING FEES. IT WAS IN THIS CONFLICTING ATMOSPHERE BETWEEN THE LEGAL REQUIREMENT FOR REASONABLE FEES, LOOSE FEE REQUESTING AND APPROVAL PRACTICES, AND SSA'S UNSUCCESSFUL ATTEMPTS TO DEAL WITH THE PROBLEMS OF UNREASONABLE FEES THAT WE UNDERTOOK OUR REVIEW.

AUDIT FINDINGS AND RECOMMENDATIONS

IN OUR REVIEW, WE EXAMINED AND ANALYZED ATTORNEY FEE PETITIONS. WE ALSO STUDIED SSA'S INTERNAL REVIEW OF FEE APPROVAL PRACTICES. WE CONDUCTED A NUMBER OF INTERVIEWS WITH ALJS. THE OBJECTIVE OF OUR REVIEW WAS TO DETERMINE WHETHER REGULATORY PROCEDURES AND ALJ APPROVAL PRACTICES WERE ADEQUATE TO ENSURE THAT REASONABLE ATTORNEY FEES WERE SET IN CASES HEARD BEFORE ALJS. OUR REVIEW FOCUSED ON A RANDOMLY SELECTED 2 PERCENT SAMPLE OF ATTORNEY FEE REQUESTS APPROVED IN 1984 FOR REPRESENTATION AT THE ALJ HEARING STAGE. THE SAMPLE APPROXIMATED 2,000 CLAIMS VALUED AT ABOUT $2.3 MILLION.

THE EXAMINATION DEMONSTRATED THAT ALJS WERE GENERALLY NOT EVALUATING ATTORNEY FEE PETITIONS IN ACCORDANCE WITH THE REGULATIONS. ALJS INDICATED THAT, FOR THE MOST PART, THEY WERE GIVING PERFUNCTORY APPROVAL TO ATTORNEY/CLIENT CONTINGENCY FEE AGREEMENTS FOR THREE REASONS. FIRST, THEY SEE THEIR PRIMARY RESPONSIBILITY AS DETERMINING THE ACTUAL MERITS OF THE CASE AND NOT A REVIEW OF THE ARRANGEMENT BETWEEN THE ATTORNEY AND CLIENT. SECOND, THE REGULATORY CRITERIA FOR EVALUATING FEE PETITIONS ARE VAGUE, TIME-CONSUMING AND GENERALLY INEFFECTIVE. THIRD, THEY ARE OVERWORKED.

CONTINGENCY FEES ARE COMMONLY THE BASIS FOR COMPENSATING ATTORNEYS IN COURT AND ADMINISTRATIVE ACTIONS INVOLVING MONETARY AWARDS. HOWEVER, THIS APPEARS TO BE IN CONFLICT WITH THE REQUIREMENT OF THE SOCIAL SECURITY ACT TO ASSIGN A REASONABLE FEE ON A CASE-BY-CASE BASIS. CONSEQUENTLY, RELIANCE ON CONTINGENCY FEE ARRANGEMENTS HAS RESULTED IN A SIGNIFICANT NUMBER OF CLAIMANTS PAYING WHAT APPEARED TO US TO BE UNWARRANTED FEES FOR ACTIONS TO RECEIVE GOVERNMENT BENEFITS. EXAMPLES WE ENCOUNTERED INCLUDED:

> A 52-YEAR-OLD MAN WITH SEVERE BACK PAIN WAS AWARDED PAST-DUE BENEFITS OF $10,887. THE ALJ AUTHORIZED THE ATTORNEY'S FEE OF $2,772 WHICH WAS TAKEN FROM THE AWARD. THE ATTORNEY WORKED ON THIS CASE FOR ONLY 7 1/2 HOURS. THE HOURLY EQUIVALENT OF THE FEE WAS $375.
>
> IN ANOTHER CASE, A 57-YEAR-OLD MAN WITH SEVERE BACK PAIN WAS AWARDED $14,076. IN THIS INSTANCE, THE ALJ APPROVED THE REQUESTED FEE OF $3,000 FOR 6 HOURS WORK, AN HOURLY EQUIVALENT OF $500.

APPROXIMATELY 55 PERCENT OF ALL FEE DETERMINATIONS BY ALJS WERE AT $75 PER HOUR OR LESS. SEVENTY-FIVE PERCENT WERE UNDER $100 PER HOUR. NINETY-TWO PERCENT WERE UNDER $150 PER HOUR. EIGHT PERCENT WERE MORE THAN DOUBLE THE $75/HR RATE THAT CONGRESS SET AS APPROPRIATE UNDER THE EQUAL ACCESS TO JUSTICE ACT, THE ONLY ANALOGOUS PROGRAM OF WHICH WE ARE AWARE. THE PROPOSED LEGAL FEES EQUITY ACT WOULD FOLLOW THE SAME FORMULA GUIDE.

TO ENSURE THAT CLAIMANTS ARE BETTER PROTECTED FROM UNWARRANTED CHARGES BY ATTORNEYS, MORE EFFECTIVE METHODS FOR EVALUATING FEE PETITIONS ARE NECESSARY. PROCEDURES MUST EMPLOY SIMPLE AND OBJECTIVE CRITERIA WHICH CAN BE EASILY AND CONSISTENTLY APPLIED BY ALJS, YET CONTAIN ADEQUATE SAFEGUARDS TO PREVENT ABUSIVE FEE PRACTICES.

RECOMMENDATIONS

1. WE WOULD RECOMMEND THAT CURRENT REGULATIONS BE REVISED SO AS TO PERMIT FEES TO BE THE LESSER OF 25 PERCENT OF PAST DUE BENEFITS AWARDED OR $75 PER HOUR. THE LIMIT SHOULD PERMIT SOME EXCEPTIONS, SUCH AS LIMITED AVAILABILITY OF QUALIFIED ATTORNEYS OR EXTREME COMPLEXITIES OF A CASE WARRANTING SPECIAL LEGAL SKILLS WHICH COULD BE DEVELOPED AND DEFINED BY THE PUBLIC RULE-MAKING PROCESS. THIS RECOMMENDATION, WHICH COMBINES THE EASE OF APPLICATION OF A CONTINGENCY FEE WITH THE PROTECTION OF AN HOURLY RATE LIMIT, APPEARS TO BE THE OPTIMAL SOLUTION.

2. WE WOULD SUPPORT THE CONSIDERATION OF RELIEVING ALJS FROM THE BURDEN OF THE DIRECT FEE DETERMINATION PROCESS, IF AN ACCEPTABLE FORMULATED SOLUTION COULD BE DEVELOPED IN PLACE OF THE CURRENT COMPLEX FEE DETERMINATION PROCESS.

3. WE BELIEVE CONGRESS MAY WISH TO REVIEW THE PROCESS WHEREBY THE GOVERNMENT FIRST INTERCEDES ON BEHALF OF THE BENEFICIARY TO AFFECT A CASH AWARD AND THEN ASSUMES THE ROLE OF COLLECTION AGENT ON BEHALF OF THE ATTORNEY TO REDUCE THE AMOUNT OF MONEY TO BE RETAINED BY THE BENEFICIARY.

THIS CONCLUDES MY TESTIMONY, MR. CHAIRMAN. WE WILL BE PLEASED TO ANSWER ANY QUESTIONS.

For The Record

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

IMPROVEMENTS NEEDED IN ATTORNEY FEE APPROVAL PROCESS COULD SAVE BENEFICIARIES MILLIONS

Richard P. Kusserow
Inspector General

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Inspector General

Memorandum

Date JAN 14 1987

From Richard P. Kusserow
Inspector General

Subject OIG Report - Improvements Needed in Attorney Fee Process Could Save SSA Beneficiaries Millions - CIN A-13-86-62607

To Dorcas R. Hardy
Commissioner of Social Security

This report summarizes the results of our review of the approval process for legal fees awarded attorneys who represent claimants in appeals of Social Security Administration (SSA) decisions at the administrative level. Our examination showed that Office of Hearings and Appeals (OHA) administrative law judges (ALJ's) were generally not evaluating attorney fee petitions in accordance with regulations implementing the requirements of the Social Security Act. Instead of objectively evaluating fee petitions for reasonableness as required, ALJ's were for the most part giving perfunctory approval to attorney/client agreements on fees. As a result, a significant number of claimants have paid what appeared to us to be excessive fees.

Our review showed that nearly half of the fee petitions approved by ALJ's equated to hourly rates which were in excess of $75 per hour, a rate above which we consider fees to be excessive. Our determination that fees above that hourly rate are excessive is based on the $75 per hour limit that the Equal Access to Justice Act and proposed legislation before Congress generally place on attorney fee awards paid by the Government to a prevailing party in litigation with the United States.

Analysis showed that 55 percent of the fees approved were less than $75 per hour, 20 percent were in the $75-$99 range, 21 percent in the $100-$199 range, 3 percent in the $200-$299 range, and 1 percent exceeded $300 per hour. Considering fees above $75 per hour to be unreasonable for representation at the nonadversarial ALJ hearing level, we estimate that of the $100 million in attorney fees charged successful Old Age, Survivors and Disability Insurance (OASDI) appellants in calendar year 1984 about $23.6 million represented excessive charges above that hourly rate. By range, $4.3 million of these charges were in $75-$99 per hour range, $10.6 million in the $100-$199 range, $6.5 million in the $200-$299 range and $2.2 million in the above $300 per hour range.

To ensure that appellant claimants are better protected from excessive charges by attorneys, more effective methods for evaluating fee petitions are necessary. To be effective, procedures must employ simple and objective criteria which can be easily and consistently applied by ALJ's yet contain adequate safeguards to prevent abusive fee practices. Conservatively, we estimate that certain changes to improve evaluation criteria could save claimants at least $15 million annually while not placing undue hardship on the attorney community.

In our draft report, we recommended that current regulations be revised to provide that ALJ's evaluate fee petitions using the general criteria that fees are acceptable up to 25 percent of past due benefits as long as they do not exceed the equivalent of $75 per hour based on a reasonable number of hours claimed by attorneys for services. The $75 per hour limit should be subject to some upward adjustment for exceptional factors, such as limited availability of qualified attorneys or extreme complexities of a case warrant special legal skills. For those few cases where past due benefits are not sufficient to yield a reasonable fee with pro forma application of the 25 percent norm, the regulations should provide additional criteria to determine a reasonable fee.

SSA in its response to our draft report deferred a decision on our recommendation pending top management evaluation of other alternatives developed by an internal study group, known as the Attorney Fee Panel. With the exception of one alternative which would determine the lesser of 25 percent of past due benefits or some multiple of the primary insurance amount as an acceptable fee, we do not consider the Panel's alternatives desirable. We believe our recommendation which combines the ease of application of a contingency fee with the protection of an hourly rate limit is the optimal solution. However, the Panel's alternative which would limit fees to the lesser of 25 percent of past due benefits or some multiple of the primary insurance amount has the same characteristics and would be an acceptable substitute for our recommendation. We recommend, therefore, that SSA reconsider our recommendation and limit consideration of other actions to the alternative we find acceptable.

BACKGROUND

Persons who are denied benefits or are terminated from benefit rolls by SSA (known as claimants) can appeal the decisions. There are several levels of administrative appeal prior to the court level including the ALJ level at which point claimants are usually represented by an attorney. ALJ hearings are nonadversarial in nature, i.e., the Government's position is not represented by counsel.[1]

Annually, ALJ's located in 135 field offices, approve about 105,000 attorney fee requests for representation of claimants at ALJ level hearings. Value of the approved fees is approximately $120 million annually. Of these about 92,000 fees valued at $100 million pertain to appeals filed under the OASDI programs. The remainder are for appeals under the Supplemental Security Income, Part B Black Lung and Health Insurance programs.

Section 206(a) of the Social Security Act requires the Secretary in cases where the determinations are favorable to the claimants and the claimants are represented by attorneys to set a reasonable fee as compensation for services. Although not specified by the Act, it has been interpreted by legal counsel that SSA can also, when petitioned, set reasonable fees in cases where the findings are unfavorable to the claimants. The Act allows the Secretary to prescribe, by rules and regulations, maximum fees for attorney services. The purpose of the provision is to protect claimants against excessive attorney fees. The Secretary has established regulations setting out criteria for judging the reasonableness of fee requests; however, there are no provisions for maximum fees. The Act also, as an inducement for attorneys to represent social security claimants, provides a measure of financial security for attorneys by requiring the Secretary to withhold part or all of the fee from the claimant's past due benefits for payment directly to the attorney by SSA. The withholding provision does not, of course, apply to unsuccessful claimants since there are no benefits due. The withheld amount is required to be the smaller of 25 percent of past due benefits, the amount set by the ALJ, or the amount agreed upon by the attorney and the claimant. The 25 percent limitation does not apply to fees but only to the amount of withholding. Fees can exceed 25 percent of past due benefits if deemed to be reasonable. Past due benefits are defined in the SSA procedural manual as benefits payable that have accumulated from date of entitlement, which is usually the date of termination or denial of initial eligibility, until the month prior to the month a favorable decision is effectuated by SSA.

To obtain payment of a fee, an attorney subsequent to completion of the hearing process submits a request for a fee, known as a fee petition, to the presiding ALJ for approval. The petition shows the basis for the fee amount and an itemization of actual time spent on the case. The social security regulations require ALJ's, when evaluating the reasonableness of fee petitions, to consider the purpose of the social security programs and seven other criteria set out within the regulations. The purpose of the social security programs is to provide a measure of economic security for the beneficiaries. In fee evaluation, the effect of a requested fee on that program objective for each case must be weighed along with the following regulatory criteria:

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[1] An exception to that format is the experimentation with adversarial hearings at the ALJ level that is being conducted by SSA at four locations.

- extent and type of services the representative performed;
- complexity of the case;
- level of skill and competence required of the representative in giving the service;
- amount of time the representative spent on the case;
- results the representative achieved;
- level of review to which the claim was taken and the level of review at which the representative became the claimant's representative; and
- amount of fee the representative requests for the service.

At the hearing level, the ALJ's have the delegated authority to determine the amount of an attorney's fee provided that the fee authorized in any one case does not exceed $3,000. Above that limit, fee requests must be approved by the Regional ALJ's. Approximately 95 percent of the fees requested for representation at the hearing level are below the $3,000 limit.

During recent years, SSA has attempted several times to amend the Social Security Act to eliminate the requirements that it set reasonable fees and withhold fees from past due benefits of successful appellants. The impetus for the attempted revisions has been heavy workloads, scarce staff resources and the cost of administration. SSA's efforts to revise the Act have been unsuccessful because of an absence of support in Congress for such a change. Also, internal efforts to develop alternatives which would lessen the burden have not to date yielded a satisfactory substitute for the present method of setting fees.

SCOPE OF AUDIT

Our review was made in accordance with generally accepted government auditing standards. The objective of our review was to determine if the regulatory procedures and ALJ approval practices were adequate to ensure that reasonable attorney fees are set for the Title II retirement, survivors, and disability insurance actions heard before the ALJ's. We reviewed fee evaluation criteria and examined attorney fee approval practices to determine if the ALJ's were complying with social security regulations for evaluating and approving reasonable fees. Our testing involved the examination and analysis of 2,002 approved fees, valued at about $2.3 million, randomly selected from 6,006 Title II attorney fee petitions processed during December 1984 (see Appendix A). Our evaluation of the system also included reviewing findings of internal studies made by SSA components of the attorney fee authorization practices.

Our field work was performed between December 1984 and May 1985 at the SSA's Office of Retirement and Survivors Insurance and OHA. Visits were also made to five OHA hearing offices to discuss the attorney fee approval practices. Offices visited were located in Baltimore, Maryland; New York, New York; Kansas City, Missouri; and St. Louis, Missouri.

COMPLIANCE WITH CURRENT REGULATIONS

Our examination showed that ALJ's generally were not evaluating attorney fee petitions in accordance with regulations implementing the requirements of the Social Security Act. Instead of objectively evaluating fee petitions for reasonableness as required by current regulations, ALJ's were for the most part giving perfunctory approval to fee arrangements agreed to between attorneys and clients. The agreements generally called for contingency fees of 25 percent of past due benefits as the amount of fee to be paid upon a decision favorable to the client. Our discussion of fee approval practices with 17 ALJ's in 5 hearing offices showed that ALJ's usually did not seriously weigh the number of hours, type of services or apply the other factors set out in the regulations in their evaluations of fee petitions. The regulatory criteria were too vague and imprecise to be methodically applied. And, meaningful effort to diligently apply them required too much time. Although not explicitly expressed, there also seemed, in our view, to be an institutionalized reluctance by ALJ's to question the judgment of fellow attorneys on the fees requested. On the inadequacies of the regulatory criteria we agree with the ALJ's. They are inadequate for general use.

Noncompliance with regulatory and procedural requirements relating to attorney fee approval practices has been well known for some time. The OHA appraisal staff has made five studies of the problem dating back to May 1980 which found loose ALJ fee evaluation practices and increasing excessive fees. OHA has several times attempted to enforce compliance with the regulatory requirements, but without success. The cumbersome requirements combined with the independent attitudes of the ALJ's seem to be circumstances precluding correction of the problem.

Based on our observations, claimants continue to need protection from high charges especially with the increasing usage of contingency fee agreements. The wisdom of the Congress in placing a requirement on the Secretary to fix reasonable attorneys' fees for appellant claimants is as applicable today as in 1968 when the current version of Section 206(a) of the Act was enacted. The critical question is how best to accomplish the desired protection. There is no reason to expect that, given another try, SSA efforts to have ALJ's diligently apply complex yet vague criteria to evaluate reasonableness would be successful.

In our opinion the most effective method for ensuring reasonable fees for claimants would be revised criteria for setting fees which are objective, easily applied, acceptable in the marketplace for legal services, and employ maximum limits on fees.

FEE APPROVAL PRACTICES

Fees overall during calendar year 1984 appear reasonable, averaging $71 per hour of work as claimed by attorneys on the fee petitions. Examination showed, however, that average to be deceptive. The $71 per hour amount was comprised of many fees considerably below that amount and likewise significant numbers above that amount (see Appendix B). Our analysis showed that while 55 percent of the fees approved by ALJ's were below an equivalent rate of $75 per hour, a rate we consider reasonable based on its usage by fee-shifting statutes, 20 percent were in the $75-$99 range, 21 percent were in the $100-$199 range, 3 percent in the $200-$299 range and 1 percent over $300 an hour including an extreme case which was the equivalent of $750 per hour. The high equivalent hourly rates are the direct result of ALJ's approving fees based on contingency agreements which call for 25 percent of past due benefits. Although contingency fees are generally acceptable as the basis for compensating attorneys in court and administrative actions involving monetary awards, they conflict with the requirement of the Social Security Act to fix a reasonable fee in each case because the amount of fee determined by contingency agreements is a matter of happenstance. In social security cases depending on the level of past due benefits, contingency fee agreements may yield either reasonable fees, unreasonably low fees or unreasonably high fees.

The extent to which ALJ's evaluate fee petitions, especially those based on contingency fee agreements, is typified by the following examples of approved fees:

- A 55-year old disabled beneficiary with a wife and two children was terminated from benefit status after a continuing disability investigation determined that his back condition was not severe enough to prevent working. The ALJ hearing the case ruled in favor of the beneficiary and awarded $5,126 in past due benefits. The ALJ also authorized the requested fee of 25 percent of past due benefits of $1,282. The attorney claimed 4 1/4 hours as the time spent on the case. The hourly equivalent of the fee paid by the beneficiary was $302 per hour.

- A 52-year old man with a wife and child filed for disability benefits because of severe pain in his neck and back. The claimant could no longer do prolonged bending, sitting, walking and lifting required for his job. The ALJ hearing the case ruled in favor of the claimant and awarded past due benefits of $10,887. The ALJ authorized the requested fee of 25 percent of past due benefits or $2,722. The attorney claimed 7 1/4 hours as the time spent on the case. The hourly equivalent of the fee was $375 per hour.

- A 36-year old man living with a wife and child was denied benefits applied for on the basis of a mental disorder. The ALJ hearing the case ruled in favor of the claimant and awarded $12,192 in past due benefits. In authorizing a fee the ALJ reduced the requested 25 percent contingency fee of $3,048 to $3,000. Ostensibly, the reduction was made only to bring the fee within the ALJ's approval authority. Despite the fact that the attorney spent only 4 hours on the case and the equivalent rate was $750 per hour, the ALJ explained the $48 reduction with the notation that "I have considered the matter thoroughly and since there were no significant complex legal, medical or vocational issues involved, I have reduced your requested fee...."

- A claim involving a 57-year old man with severe back problems was denied. The ALJ found in favor of the claimant and awarded $14,076 in past due benefits. The attorney requested a fee of $3,000 which happened to match exactly the limitation on the ALJ's approval authority. The ALJ approved the fee as requested. The attorney claimed 6 hours spent on the case. The hourly equivalent of the fee paid by the claimant was $500 per hour.

- A 49-year old father of two was denied benefits applied for on the basis of kidney disease, high blood pressure, poor blood circulation and severe chest pain. The ALJ hearing the case ruled in favor of the claimant awarding $15,855 in

> past due benefits. The attorney requested $3,964 or 25 percent of past due benefits as his fee. The ALJ in approving a fee reduced the amount requested by $964 to $3,000. The intention of the ALJ apparently being to bring the fee within his approval authority of $3,000. The reduction though sizeable was insufficient to yield a reasonable fee since the attorney spent only 7 hours on the case. The hourly equivalent of the fee paid by the claimant was $429 per hour despite the reduction.

Although the Act permits the Secretary to set maximum fees, no maximum has been established. We believe the absence of a fee maximum along with the liberal approval practices of ALJ's has allowed many claimants to be charged excessive fees.

CRITERIA FOR ENSURING REASONABLE FEES

Remedy of the problem of unreasonable fees, we believe, requires replacement of the present regulatory criteria and its attendant enforcement problems with simplified objective criteria which could be easily and consistently applied by ALJ's yet contain adequate safeguards to prevent excessive fees. An attractive alternative would be employment of formula type standard as the general criterion for evaluating the reasonableness of fee petitions. One, we favor, would apply a 25 percent factor to the past due benefits and set the amount obtained as the reasonable fee provided it did not exceed the equivalent of an hourly maximum of $75 per hour computed using the hours spent by the attorneys and their staffs on a case as claimed on the fee petitions and evaluated for general reasonability by the ALJ's.

The 25 percent factor should not cause much reaction from either claimants or attorneys because it is in general use in agreements. There are two minor drawbacks which should be easily remedied. In an estimated 5 percent of the cases, the 25 percent standard will not produce reasonable fees for the attorneys because the amount of past due benefits is insufficient for reasons of small monthly benefit amounts or a short period of retroactivity. For these cases, the standard will need to be augmented with special criteria, possibly a modified version of the present regulatory criteria, to facilitate the fixing of reasonable fees. In other cases where claimants elect continuation of benefits during the appeal process (about 9 percent of the cases), this definition of past due benefits would need to be modified to include benefits paid under the continuation of payment provisions of the law in order to effectively apply the standard.

As for evaluation of the reasonableness of the time claimed by attorneys, a judgment of general reasonability by the ALJ's should suffice. Judgments on the reasonability of time claimed to be spent on cases should be easy, requiring only a small amount of time per case since ALJ's evaluating the fee petitions are well aware of case complexities, having presided over the hearings. However, to aid the ALJ's SSA might consider developing a matrix consisting of rough estimates of the time spent for common disability cases to serve as a guideline for ALJ's in evaluating the number of hours on which a fee would be based.

Our conclusion that the maximum hourly rate should be limited to $75 except in very unusual circumstances, is based primarily on the Equal Access to Justice Act (EAJA). The EAJA established limits on the amounts awarded for attorney fees incurred by individuals who prevail in adversary adjudications against the Government including appeals of social security decisions which are adjudicated at the court level. In a 1985 paper titled Award of Attorneys' Fees and Other Expenses in Judicial Proceedings Under the Equal Access to Justice Act (Revised Edition), the Department of Justice, Office of Legal Policy stated that "The hourly rate at which counsel may be compensated under section 2412(d) is limited to $75 per hour by the Act. However, that does not mean that all counsel automatically are entitled to receive $75 per hour. An attorney is only entitled to receive the rate prevailing in the particular community for similar work." The paper goes on to state that:

> "A court may award attorneys' fees in excess of $75 per hour if it determines that an increase in the cost of living or special factor, such as limited availability of qualified attorneys for the proceeding involved, justifies a higher fee. Because Congress recently reenacted the $75 per hour limitation, it is highly unlikely that a cost of living increase over $75 per hour could be justified. The circumstances in which a competent counsel cannot be hired at this rate should be extremely rare. The real issue is whether there is a total absence of competent counsel at the rate of $75 per hour. Only in the most esoteric of specialties could it be argued that competent counsel could not be found at or below the ceiling set out in the Act." (Underscoring added)

We estimate that about 92,000 fee petitions are filed by attorneys each year for representing claimants in appeal of Social Security Administration decisions at the administrative level. This volume would seem to rule out any possibility of such legal work being considered an esoteric specialty as discussed above.

Also lending credence to adoption of the $75 per hour limit is a proposed law, the Legal Fees Equity Act (LFEA), now under consideration by the Congress. It would standardize the maximum attorney fee payable under all Federal fee-shifting statutes at $75 per hour. Fee-shifting statutes specifically provide under the terms of various statutes for awards of attorneys' fees to parties who prevail against the Federal, State and local governments in judicial and administrative proceedings (the Social Security Act does not contain any fee-shifting provisions, however, the fee-shifting aspects of EAJA apply to social security appeal cases at the court and adversarial administrative levels).

We believe a strong case can be made for using the same $75 per hour limit on fees charged social security claimants who appeal at the ALJ hearing level. If, as under the EAJA, attorney fee awards paid by the Government are limited to $75 per hour in adversarial adjudications, i.e., the Government's position is represented by counsel, it seems logical then that the same $75 per hourly rate limit be set for social security administrative adjudications which, in the aggregate, are generally nonadversarial and involve nonworking, disabled claimants who can least afford the payment of high fees.

Further, our analysis of fee petitions showed that substantial attorney time was devoted to routine clerical tasks, such as compilation of case files, photocopying of exhibits, dictation to the files and scheduling hearing appointments. From our observations, much of the time claimed on the fee petitions appeared to have been for duties actually performed by nonattorney staff including secretaries, paralegals and clerks. With regard to such services, the Department of Justice in the previously mentioned paper states that:

> "Counsel should not be compensated at the same hourly rate for the different types of services performed. Copeland, 641 F.2d at 892. For example, counsel may be compensated at a lower hourly rate for work not performed in court. They should also be compensated at paralegal and clerical hourly rates for performing such functions."

For ease of application, we would not advocate multiple maximums for different types of services, but believe that Justice's position on the matter does support the reasonableness of the $75 maximum.

In order that the $75 per hour limit not become a deterrent for the attorney community to provide adequate representation to social security appellants, provision should be made to adjust the rate from time to time to reflect inflation or special factors, such as limited availability of qualified attorneys.

Provision should also exist for individual adjustment in exceptional cases where the complexities of a case are so extreme as to require special legal skills.

In a test of the formula criteria suggested, we applied the $75 per hour maximums to our sample of approved attorney fees. The results showed that of $100 million in fees paid by OASDI claimants in calendar year 1984 $23.6 million were above the limit and considered by us to be excessive. These excessive fees breakdown as follows:

Equivalent Hourly Rate	Value of Fees Authorized (millions)	Excess of Authorized Fee Above $75 Per Hour (millions)
$75-$99	$21.5	$4.3
$100-$199	25.4	10.6
$200-$299	9.2	6.5
above $300	2.5	2.2
	$58.6	$23.6

Of the $23.6 million in excessive charges, we conservatively estimate that $15 million could have been saved the claimants had there been a $75 per hour maximum placed on contingency fees. Our calculations of the savings to the claimants assume that attorneys whose charges were low during the sample period had for computation purposes charged 25 percent of past due benefits up to a limit of $75 per hour. For illustration purposes, the methodology compensates for any possible move upward of lower fees which might occur if a $75 per hour limit were imposed. In reality, however, there would be some upward movement of the lower fees, but certainly not all attorneys could be expected to raise their fees to the limitation. In which case the savings to the claimants would exceed $15 million annually.

RECOMMENDATION

To better ensure that appellants are protected from excessive fees as is the intent of the Social Security Act and to improve the administration of the fee approval process, we recommended that SSA revise current regulations to provide that:

- ALJ's evaluate fee petitions using the general criteria that fees are acceptable up to 25 percent of past due benefits as long as they do not exceed the equivalent of $75 per hour based on a reasonable number of hours claimed by attorneys for services;
- the $75 per hour limit be upwardly adjustable where exceptional factors exist, such as limited availability of qualified attorneys or if the extreme complexities of a case warrant special legal skills; and

- supplemental criteria be applied to determine reasonable fees for those relatively few cases where application of the general criteria would not yield adequate fees because of insufficient past due benefits.

SSA COMMENTS

SSA agreed with our conclusion that hourly rates in excess of $75 per hour seem excessive and expressed concern that approval of fee petitions might be perfunctory, consequently, resulting in excessive fees to claimants. SSA, however, deferred a decision on our recommendation pending top management evaluation of conclusions developed by an internal study group, known as the Attorney Fee Panel. The Panel proposed a number of alternatives for improving the fee approval process. None of which, however, incorporated our recommendation in total. Some of the Panel's possible solutions seem to have merit while others would have no benefit and, in fact, would encourage more excessive fees. Among the alternatives perceived as viable by the Panel are: complete deregulation of the fee approval process; adoption of a 25 percent contingency fee without limits; adoption of fee formula which accepts as reasonable the lesser of 25 percent of past due benefits or some multiplier of the primary insurance amount; establish hourly rate for fee of $75 per hour or some other appropriate rate; establish contingency fees based on national average fees; and retain the current system with some improvements such as attorney affidavits attesting to hours worked and services provided, enhanced training and additional management information gathering.

With the exception of the alternative which incorporates the criteria of a 25 percent contingency fee with a limit of some multiple of the primary insurance amount, we do not see the proposed alternatives as desirable. Each of the other proposals either loosen the system too much and would work to the detriment of the claimants, require studious evaluation by ALJ's of attorney hours claimed or was tried previously without success. We believe our proposal of a 25 percent contingency fee with a limit of $75 per hour provides the optimal solution and should be adopted. It protects the claimant from excessive charges with a minimum of ALJ review time. We do, however, find the Panel's proposal of a 25 percent contingency fee limited to some multiple of the primary insurance amount an acceptable alternative provided the limit is realistic. The multiple must be established so that it yields fair fees.

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If you or your staff wish to discuss these matters further, please let me know or contact Thomas D. Roslewicz, Assistant Inspector General for Audit on FTS 472-3155. We would appreciate a status report within 60 days on the progress being made in implementing our recommendations. A copy of this report is being sent to interested departmental officials.

APPENDIXES

Sampling Plan and Results

Universe

Population consisted of 6,006 attorney fee authorizations processed during December 1984 for appealed Title II only and concurrent Title II and XVI decisions heard at the ALJ level. Fee authorization forms are usually destroyed by OHA headquarters personnel after extracting statistical data. At the start of our review, therefore, no centralized file of fee authorizations was available for sampling. The universe of 6,006 fee authorization forms was obtained by having OHA retain for our use the forms processed during the first full month following the start of our review. That month was December 1984. Based on discussions with OHA personnel and perusal of the forms, we determined that there were no reasons to believe that December 1984 was not typical of any other month of the year. We, therefore, considered use of authorization forms processed during December 1984 to be appropriate for estimating the results of our findings. In order to present the results of the review in annualized terms, findings based on the December 1984 authorizations were extrapolated over a 12-month period.

Sampling Unit

A sampling unit was a fee authorization form received from OHA headquarters. Each unit had appended attachments which usually included a fee petition, the attorney/client agreement and a computation of past due benefits.

Sample Selection

Using a random start, a sample of 2,002 Title II and concurrent Title II and XVI fee authorizations was selected by systematically extracting every third authorization form from the universe of 6,006 authorizations. The data from these forms were placed on a computerized file for analysis. Further, to determine the effect of our proposed criteria for evaluating the reasonableness of fee requests (25 percent of past due benefits not to exceed $75 per hour) it was necessary to consult claim folders. Because of the labor intensive nature of a folder review, a subsample of 222 fee authorizations was selected from our primary sample of 2,002 fee authorizations. The selection was made systematically using a random start. Because 8 claim folders were not locatable, our effective subsample was 214 fee authorizations.

Analysis of Primary Sample

A general analysis of the 2,002 sample cases developed the following statistics which are presented in the body of the report:

- Average time claimed by attorneys as spent in preparation and adjudication of a case was 16 hours. That average was determined by dividing the total number of hours of services for the sample (31,529) by the total number of fee petitions reviewed (1,951).[2]
- Average equivalent hourly rate per approved fee was $71. That average was determined by dividing the total value of fees approved for the sample ($2,242,056) by the total number of hours of services for the sample (31,462 based on 1,947 fee authorizations).[3]
- Percentage of approved fees in excess of an equivalent rate of $75 per hour (45 percent) was determined by dividing the total number of fee authorizations with approved fees in excess of $75 per hour (872) by the total number of fee authorizations (1,947).[4]

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[2] In 2,002 sample cases, 51 fee petitions did not show the number of hours for attorney services rendered and were excluded from the computations.

[3] In addition to the 51 fee petitions which did not contain the number of hours for attorney services rendered, 4 cases did not show the authorized fee amount. These cases were excluded from the computations.

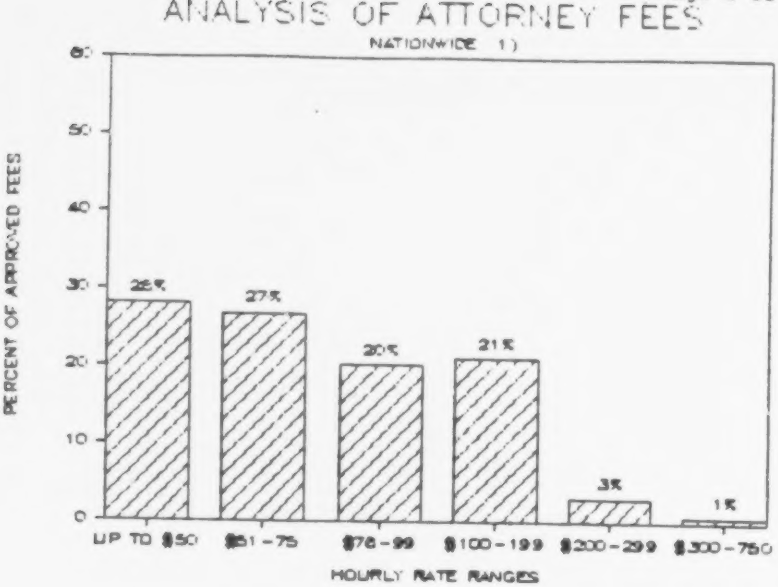
[4] Same as footnote 3.

Analysis of Subsample

	No. of Cases	Fee Amount Authorized	Percentage of Authorized Fees	Excess Fee Amounts Above $75 Per Hour	Percentage of Authorized Fees
Sample Data:					
Fees equivalent to $75 per hour or less	119	$100,698	41.38		
Fees equivalent to $76 per hour or more:					
$76-$99/hr.	44	52,499	21.57	$10,572	4.34
$100-$199/hr.	38	61,774	25.39	25,810	10.62
$200-$299/hr.	10	22,378	9.20	15,728	6.46
$300 and above/hr.	3	6,000	2.46	5,250	2.16
Sample Total	214	$243,349	100.00	$57,360	23.58
Extrapolation to Annualized Universe 1/:					
Fees equivalent to $75 per hour or less		$41,380,000			
Fees equivalent to $76 per hour or more:					
$76-$99/hr.		$21,570,000		$4,340,000	
$100-$199/hr.		25,390,000		10,620,000	
$200-$299/hr.		9,200,000		6,460,000	
$300 and above/hr.		2,460,000		2,160,000	
Subtotal		$58,620,000		$23,580,000	
Annual Totals		$100,000,000		$23,580,000	

1/ Extrapolitation made by applying percentage relationships determined for the subsample to the annual value ($100 million) of fees authorized.

APPENDIX B
Page 1 of 7



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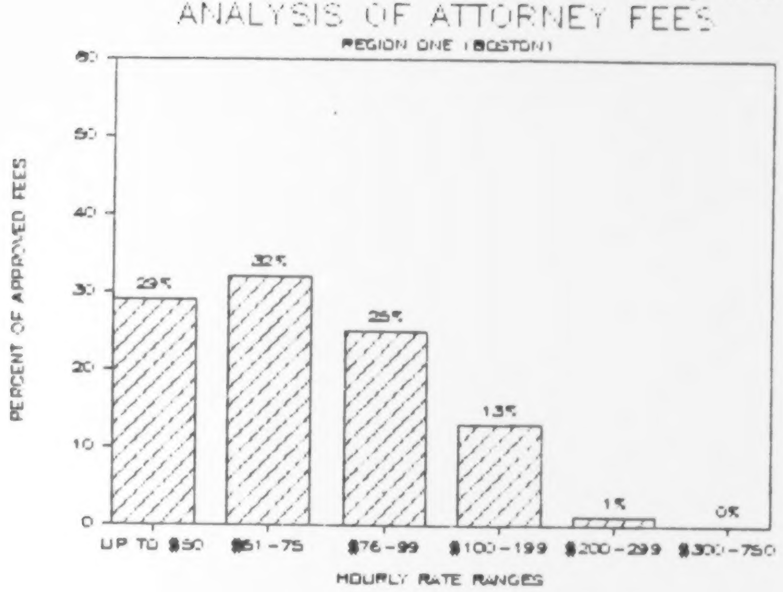
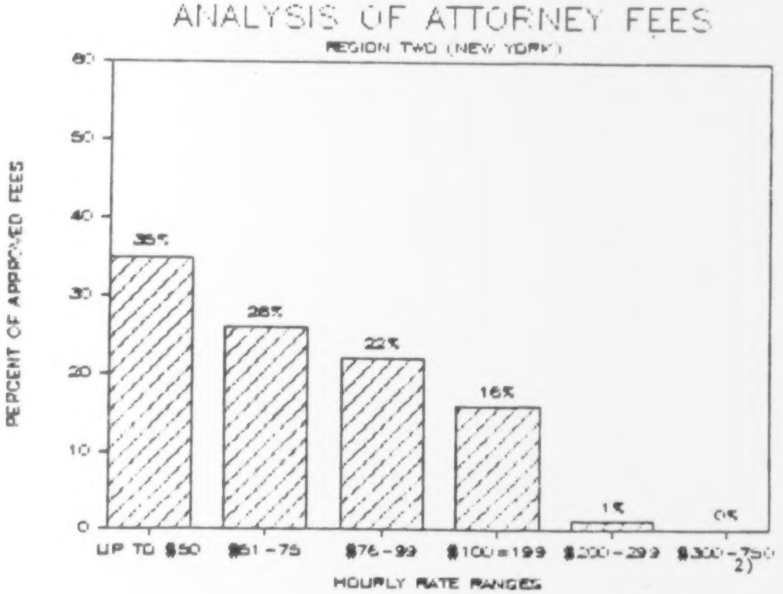
1)
THE AVERAGE ATTORNEY FEE BASED ON OUR NATIONWIDE SAMPLE WAS THE EQUIVALENT OF $70 PER HOUR CLAIMED ON FEE PETITIONS. THIS GRAPHIC SHOWS THE DISTRIBUTION OF FEES BY RANGES OF HOURLY EQUIVALENTS THAT COMPRISE THE $70 PER HOUR AVERAGE. PAGES 2 THROUGH 7 OF THIS APPENDIX SHOW THE SAME DATA ARRAYED BY REGION.


ANALYSIS OF ATTORNEY FEES
REGION ONE (BOSTON)
PERCENT OF APPROVED FEES
0
10
20
30
40
50
60
29%
32%
25%
13%
1%
0%
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750
HOURLY RATE RANGES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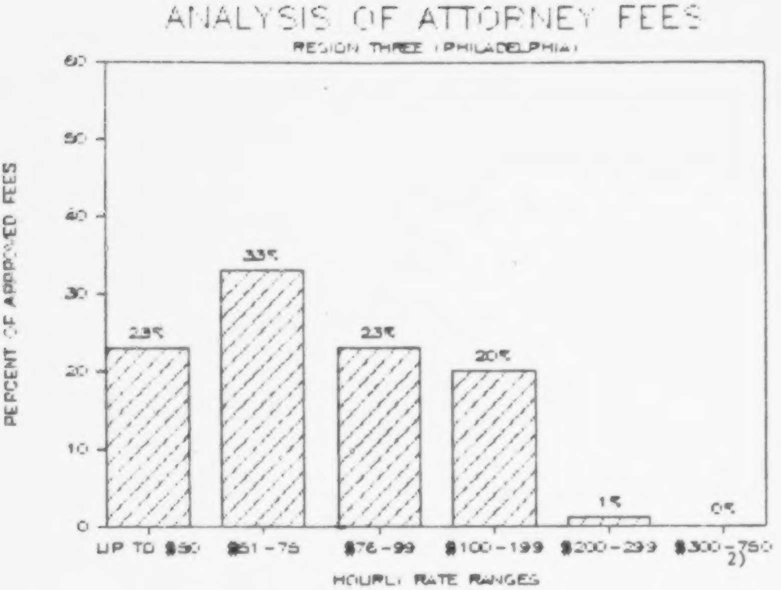
PERCENT OF APPROVED FEES
0
10
20
30
40
50
60
35%
26%
22%
16%
1%
0%
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750
2)
HOURLY RATE RANGES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REGION THREE (PHILADELPHIA)
PERCENT OF APPROVED FEES
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40
30
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23%
33%
23%
20%
1%
0%
UP TO $50
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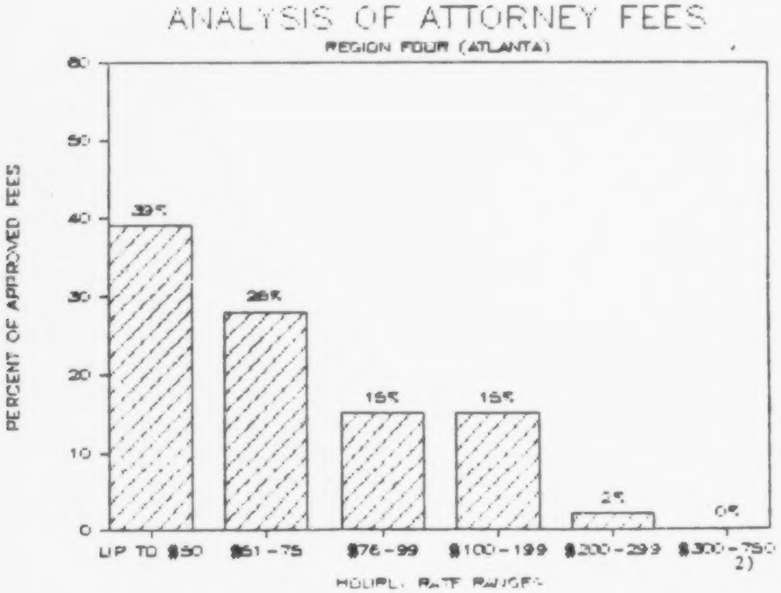
$100-199
$200-299
$300-750 2)
HOURLY RATE RANGES


ANALYSIS OF ATTORNEY FEES
REGION FOUR (ATLANTA)
PERCENT OF APPROVED FEES
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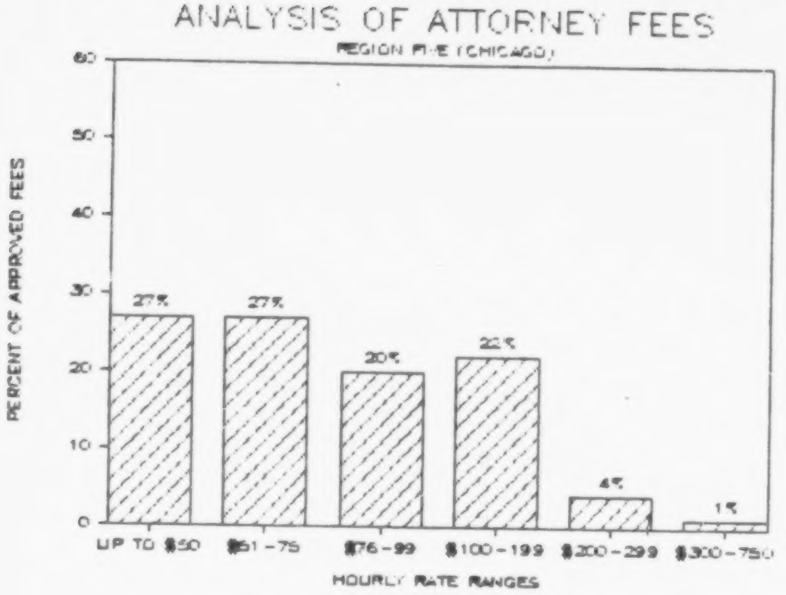
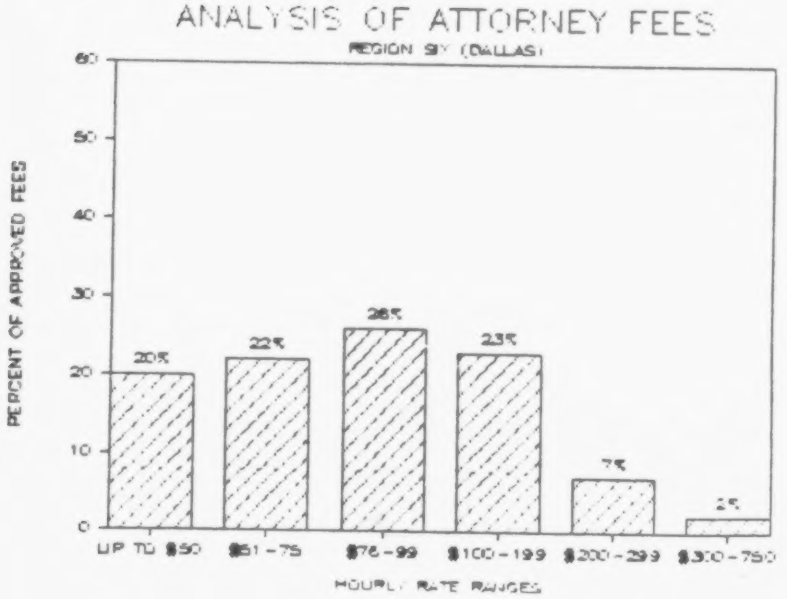
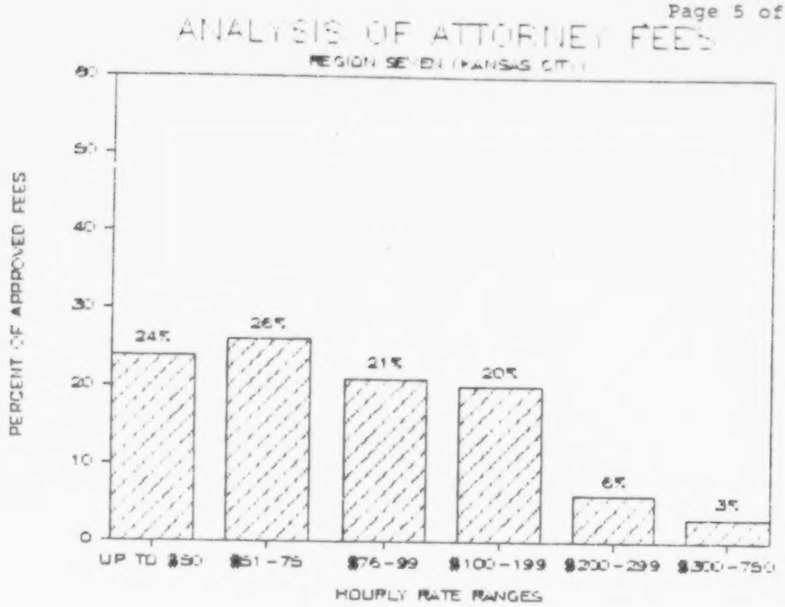
50
40
30
20
10
0
39%
28%
15%
15%
2%
0%
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750 2)
HOURLY RATE RANGES

APPENDIX B
Page 4 of 7



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REGION SEVEN (KANSAS CITY)
PERCENT OF APPROVED FEES
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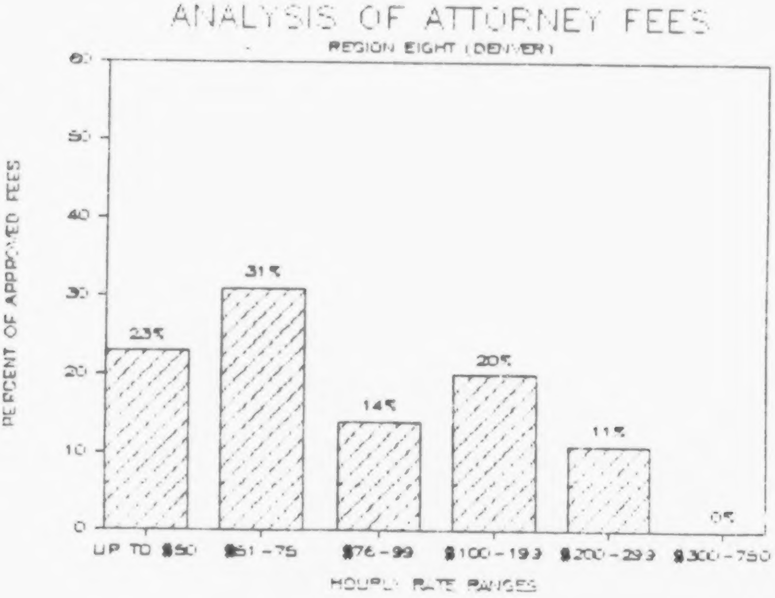
20
30
40
50
60
24%
26%
21%
20%
6%
3%
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750
HOURLY RATE RANGES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REGION EIGHT (DENVER)
PERCENT OF APPROVED FEES
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20
30
40
50
60
23%
31%
14%
20%
11%
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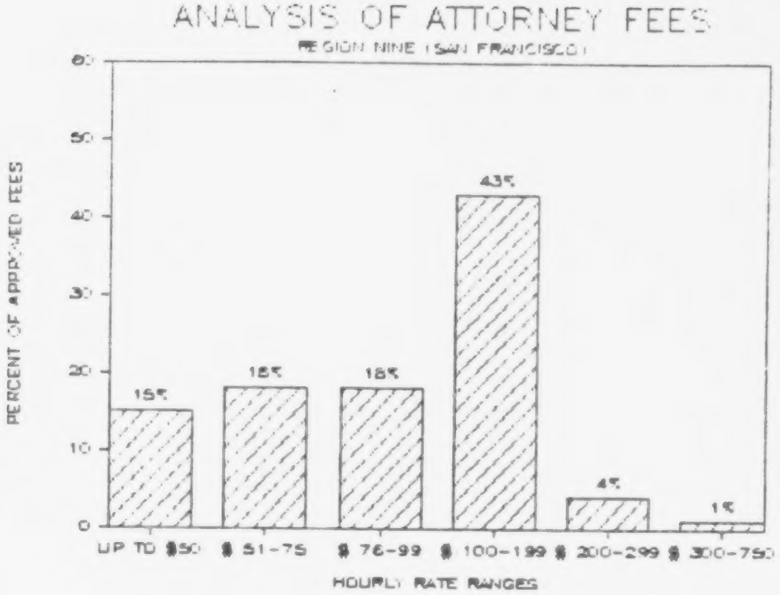
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750
HOURLY RATE RANGES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PERCENT OF APPROVED FEES
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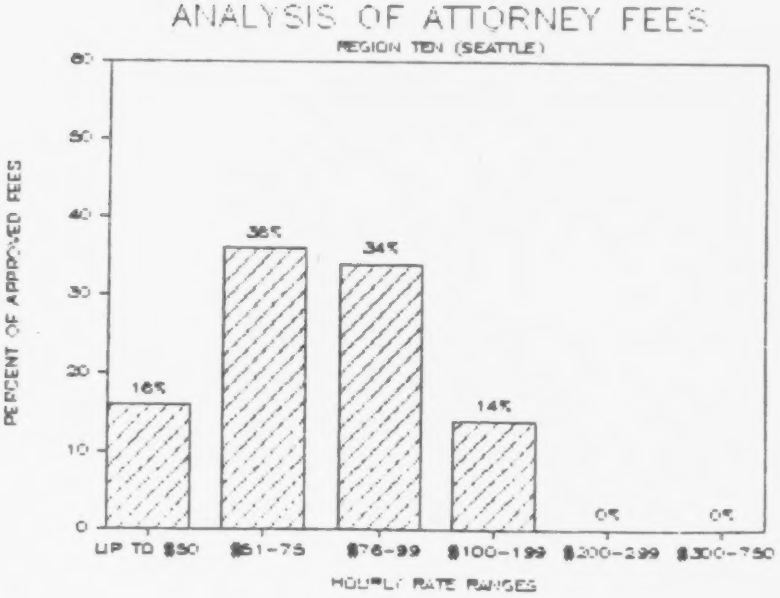
50
40
30
20
10
0
15%
18%
18%
43%
4%
1%
UP TO $50
$ 51-75
$ 76-99
$ 100-199
$ 200-299
$ 300-750
HOURLY RATE RANGES


ANALYSIS OF ATTORNEY FEES
REGION TEN (SEATTLE)
PERCENT OF APPROVED FEES
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50
40
30
20
10
0
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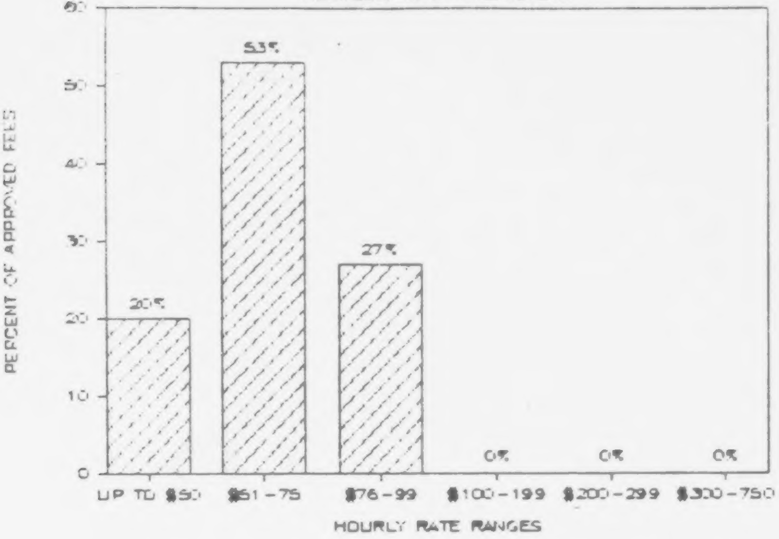
36%
34%
14%
0%
0%
UP TO $50
$51-75
$76-99
$100-199
$200-299
$300-750
HOURLY RATE RANGES

ANALYSIS OF ATTORNEY FEES



2)
ONE SAMPLE FEE WAS IN THE $300 - $750 RANGE. DUE TO ROUNDING THIS OCCURRENCE IS NOT REFLECTED AS A PERCENTAGE.

APPENDIX C
Page 1 of 4

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to SLJ3

Memorandum

Date · SEP 25 1986

From Dorcas R. Hardy Dorcas R. Hardy
Commissioner of Social Security

Subject Office of Inspector General Draft Report, "Impnovements Needed in Attorney Fee Approval Process Could Save Beneficiaries Millions"--INFORMATION

To Mr. Richard P. Kusserow
Inspector General

Attached is our response to your draft report, "Improvements Needed in Attorney Fee Approval Process Could Save Beneficiaries Millions." If we can provide additional information, please let us know.

Attachments:
Tab I - SSA response

COMMENTS OF THE SOCIAL SECURITY ADMINISTRATION ON THE OFFICE OF INSPECTOR GENERAL'S DRAFT REPORT, "IMPROVEMENTS NEEDED IN ATTORNEY FEE APPROVAL PROCESS COULD SAVE BENEFICIARIES MILLIONS"

General

We share the Office of Inspector General's (OIG) concerns about the attorney fee process. We agree with the conclusion in the draft report that hourly rates in excess of $75/hour seem excessive. We are also concerned that claimants who rely on the Social Security Administration (SSA) for equitable treatment in attorney fee decisions may be receiving no more than a perfunctory approval of the fee petitions, and, consequently, could be paying excessive fees.

OIG Recommendations

That SSA revise current regulations to provide that:

-- ALJ's evaluate fee petitions using the general criteria that fees are acceptable up to 25 percent of past due benefits as long as they do not exceed the equivalent of $75 per hour based on a reasonable number of hours claimed by attorneys for services;

-- the $75 per hour limit be upwardly adjustable where exceptional factors exist, such as limited availability of qualified attorneys or if the extreme complexities of a case warrant special legal skills; and

-- supplemental criteria be applied to determine reasonable fees for those relatively few cases where application of the general criteria would not yield adequate fees because of insufficient past due benefits.

Social Security Administration (SSA) Comment

We agree with OIG's conclusions that present regulations provide inadequate criteria for the use of administrative law judges (ALJs) in evaluating and approving attorney fees, and that steps need to be taken to address this issue. A meeting is currently being scheduled to bring together top SSA staff to consider possible courses of action put forth by the Attorney Fee Panel convened earlier this year to assess the processes and standards used to evaluate attorney fee petitions. The Panel's report is now complete. The Panel reached the following conclusions:

1. Complete "deregulation" of the attorney fee approval process through repeal of the various statutory requirements concerning fee approval and fee withholding by the Secretary should be considered. Among the options suggested in this area are (a) repeal of all statutory

requirements for administration of the fee process, (b) continuation of withholding but modification of the fee approval provision to authorize (without further agency review) contingency fee agreements up to a maximum of 25% of past due benefits, and (c) modification of both the withholding and approval provisions to authorize a formula of the lesser of 25% of past due benefits or some multiplier of the Primary Insurance Amount or Supplemental Security Income Federal Benefit Rate. (Such a formula could be promulgated under existing regulatory authority without a statutory change, of course.)

2. The current regulations fail to provide those who assess fee petitions with precise, objective standards which would aid in achieving the primary goal of the fee approval process--namely, reasonable and consistent fees. Among the options suggested by the Panel for regulatory change to increase consistency in fees are (a) establish an hourly rate for attorney fees either at the $75 per hour rate authorized by the Equal Access to Justice Act (EAJA) (and endorsed by the OIG) or at some other rate to be determined, (b) establish a fee scale related to the number of hours of service, and (c) establish a formula for contingency fees based upon the national average fee per program. The Panel also notes many permutations of these options could be devised.

3. The current regulations do permit some bargaining between claimants and their attorneys over fees, although it is not clear whether or to what extent competition among attorneys now exists. While the fees currently approved do vary, claimants do not appear to be dissatisfied with the fees which are being approved, nor do attorneys, although attorneys do have complaints about the delay attendant with the process and about "arbitrary" fee reductions.

4. Establishing the "right" fee amount or fee schedule to quantify the current regulatory requirement that fees be "reasonable" will be difficult. The Office of the Inspector General relies on the EAJA's $75 per hour as an appropriate standard, but there are no data available to suggest that $75 per hour is appropriate for Social Security cases. In addition, any hourly rate criterion has drawbacks; those currently charging less will be inclined to move up to the new standard, and policing unethical practitioners who may pad their fee petitions with "extra" hours would be difficult.

5. The Panel also suggests that one option is to maintain the current system and institute more modest improvements, some of which are justified regardless of the option(s) finally adopted. Among these improvements are requiring attorneys to file affidavits detailing the hours worked and service(s) performed, training for those who approve fees, and gathering additional management information about fee petitions and fee approvals.

We are not in position right now to definitively say which alternatives will be chosen. We can, however, assure OIG that action will be taken to correct this situation, and we will keep the auditors apprised of our progress.

OIGAA NOTE

Certain comments have been deleted. The deletions related to statements in the draft report which have been changed in the final report.

Chairman JACOBS. Mr. Archer.

Mr. ARCHER. Mr. Roslewicz, your report categorized fees in excess of $75 an hour as excessive based on the standard of payment under the Equal Access to Justice Act. Using that standard, you determined that attorney fees were excessive in almost 45 percent of the 2,000 cases sampled.

That finding suggests to me that you were using a reasonable but rather stringent standard. Did you compare that $75 an hour standard with any other comparable activity, like workmen's compensation suits, for example?

Mr. ROSLEWICZ. At the time of our review, sir, that was the only standard that we could find to compare within the Government as to what the Government was willing to pay as attorneys' fees.

Now, again, with regards to our review, what we were trying to do is to determine how well SSA was coupling with section 206(a) of the act, which requires a case-by-case determination by the Secretary as to what was a reasonable fee.

Again, as I stated in my testimony, if a formulated method could be developed, we would be willing to consider that and evaluate the merits of that system as well. We also indicate in our report that we would be open to such other proposals.

Mr. ARCHER. So, for example, in more expensive urban areas where attorneys are paid more, you would not have any objection to having a standard in which $75 could be exceeded so that people would have access to perhaps what they might consider more quality representation?

Mr. ROSLEWICZ. Right. Sir, as we say in our report, there is an escalation clause which says that we are recommending a $75 limit, but we also recognize that there can be exceptions such as, shortages of attorneys and case complexity.

Mr. ARCHER. How would you define that for the purpose of implementation, if you are going to give guidelines to the ALJ or the person who determines whether or not they are reasonable? It sounds to me like you are just saying, well, there ought to be some subjective trap door out there that just opens whenever it is necessary to open. I do not think that is going to help us in trying to set any congressional guidelines.

Mr. ROSLEWICZ. The current criteria that the ALJs have to go by is not being followed, I guess for the three reasons I have mentioned in my testimony. Now, to determine how to adjust the $75 fee so that it is reasonable in all given situation's, could be a problem. I guess, as I said, we would have to consider the various elements, such as geographical variations. For example, what are the problems in the States of West Virginia versus New York or what are the differences and problems with determining legal services at $75 per hour.

Is it because of the shortage of attorneys, or is it because of other reasons? Our report did not go into details in that specific area.

Mr. ARCHER. Well, I do not want to belabor this, but you have been somewhat critical of the ALJs' perfunctory approval of fee agreements, as I understand your testimony, and you observe that there is a reluctance on the part of the ALJs to question the judgment of fellow attorneys on the fees requested. You have cited various reasons for that, overwork, et cetera. Yet you seem to be recommending that the ALJs continue to evaluate the fee petitions, subject to a $75 an hour ceiling, but also subject to some subjective criteria wherever it might be necessary.

Now, I find it difficult to relate those.

Mr. ROSLEWICZ. Well, I think we would have to define what those exceptions are and where they would be. What we are saying is that at the time of our report this was the best benchmark that we could come up with—the $75 per hour, which is the amount that Congress was willing to reimburse claimants for on attorneys' fees.

So we used that as a benchmark to have some kind of a standard to determine what is reasonable and what is not.

Mr. ARCHER. But you are still suggesting that it is appropriate for the ALJs to be the people who evaluate the fairness of the fee petitions?

Mr. ROSLEWICZ. Yes, sir. In our report, that is what we recommended.

Mr. ARCHER. It sounds to me like there is a conflict. I do not see how we are doing anything to lighten the work load on the ALJs, which you cite as a reason why they have problems in performing this review; and further that they believe they are really only there to hear the merits of the case. I do not see how we are changing any of that, and yet we are still going, if we follow your recommendations, to have the ALJs be the entity that will evaluate the fees.

Mr. ROSLEWICZ. I think it would tend to lighten their work load because, in a sense, you are establishing a standard to be used to determine a reasonable fee; to use as a benchmark. It should also lighten the ALJ's work load in the sense that they can apply the standard against the past due benefits and hours claimed—the ALJ is probably in the best position to know how complex the particular case was that was presented before him. So he certainly should be able to know after he reviews the case as to whether or not there were any complexities involved within that particular case file.

On the one hand, if there were some kind of a formulated method, it would give the ALJ some leeway in terms of that.

Mr. ARCHER. Okay. Thank you very much.

Chairman JACOBS. Tom, in the case of the $2,700 fee for 6 hours' work, does your study delve into an opinion by the ALJ as to why that was justified?

Mr. ROSLEWICZ. What we had to look at, Mr. Chairman, was the fee petition that the attorney submits, which has the basics on there as to what were the hours and what was involved and so forth.

As I said, we interviewed about 17 ALJs, and we did talk to them to find out what problems they had in terms of reviewing these fee petitions.

Chairman JACOBS. I wondered how anybody explained the $500 per hour fee. Was it the ALJ's cousin or what was the problem there?

Mr. ROSLEWICZ. Emil, could you respond to that?

Mr. MALLEK. Generally, there is no explanation required on the approval.

Chairman **Jacobs**. I appreciate that, but I am talking about your study. I do an official act, and I suppose there is no explanation required until I get a call from the newspapers.

Mr. **Mallek**. When they reduce the fee, they do explain it.

Chairman **Jacobs**. I appreciate that. I am not talking about a normal order of performance of duty. I am talking about in response to your study. Did you interview any of these people and say, "What is going on?"

Mr. **Mallek**. Any of the attorneys?

Chairman **Jacobs**. No, the ALJs.

Mr. **Mallek**. Yes, we did, and they stated to us that they felt that that was the going rate in the marketplace.

Chairman **Jacobs**. $500?

Mr. **Mallek**. Well, 25 percent.

Chairman **Jacobs**. Okay. I have got that. We are talking contingency, then, rather than hourly rate. So if I am smart enough to call up an insurance company, and they are scared enough of my alleged talents in the courtroom and I can recover a half a million dollars and take a 30-percent fee from it, it is not so much the time I spend as the results I obtain. That is a factor, is it not?

Mr. **Mallek**. That is true.

Chairman **Jacobs**. On the equal access to justice statute, is there not a formula for adjustment over a period of time, the level of the just compensation?

Mr. **Mallek**. I do not think it is an exact formula. It is determined by the judge.

Chairman **Jacobs**. Determined by the judges?

Mr. **Mallek**. The judge involved in the particular case.

Chairman **Jacobs**. What is the Equal Access to Justice Act if it does not have a formula? I do not understand.

Mr. **Mallek**. It provides for acceleration where special factors exist, such as cost of living or availability of attorneys.

Chairman **Jacobs**. And what is the present level?

Mr. **Mallek**. That was $75 an hour plus——

Chairman **Jacobs**. Why is it some people say it is $90? It seems to me there should not be too much confusion there.

Mr. **Mallek**. In certain districts, I think there have been court cases where maybe the judge has awarded $90. In some cases, it may have exceeded $100, if I am not mistaken, it is on a case-by-case basis.

Chairman **Jacobs**. If it is 90 and has exceeded 100, why do you say it is $75?

Mr. **Roslewicz**. I think it is the same criteria that we are using for our recommendation of $75 where there are exceptions that can be recognized, where the rate can be higher.

Chairman **Jacobs**. Does your study take all of them and divide by all of them and say what the average is?

Mr. **Mallek**. The average of what?

Chairman **Jacobs**. When you say it is the exception, I assume there are 10 million at $75 and one at $90. Are you saying that, or what are the proportions? How many 90s and how many 75s?

Mr. **Mallek**. We did not get into that, sir.

Chairman **Jacobs**. Now, the matter that Mr. Archer was asking about, what guidelines do you have for these exceptional fees? I think in the prospective payment program we had a concept called outliers which was supposed to cover the more complicated broken leg or more complicated case.

In determining what the rate ought to be in New York and what it ought to be in Fayette, Miss., do you not have an example in the compensation of so-called blue collar workers by the Federal Government?

Mr. ROSLEWICZ. No we do not, but I agree with the point you are making that geographical variations are relevant.

Chairman JACOBS. I think if you would look into it there is some sort of formula so that the recognized cost of living in Manhattan and New York might be a tad higher than in downtown Fayette, Miss. It seems to me that is something we might take into account.

Finally, do you find any comparison between the rules for lawyers' compensation under Social Security and the rules for physicians' compensation under Social Security?

In other words, a lawyer representing a claimant under the disability program can receive an ordered payment from the award. Can he or she then go ahead and charge whatever he or she wishes from the same client on the private side in the same case?

Mr. ROSLEWICZ. Over and above what he has already received?

Chairman JACOBS. Yes.

Mr. ROSLEWICZ. I do not think he can. No, he cannot.

Chairman JACOBS. Is that just prohibited by regulation, or would that be a crime?

Mr. ROSLEWICZ. The regulations state that. The Secretary determines the fee so the ALJ——

Chairman JACOBS. Is it also a crime to charge more than the government award for an attorney?

Mr. ROSLEWICZ. Yes sir. Section 206(a) of the Social Security Act deems such practice a misdemeanor and calls for a fine up to $500 and/or imprisonment for up to 1 year.

Mr. ARCHER. Mr. Chairman, if you would yield, that is a very good question, and we would be curious as to what penalty would be exacted for failure to comply. If there is no penalty, it seems to me that there would be no teeth in that provision.

Chairman JACOBS. I think you will find, if you take a look, that there probably is a penalty and not a light tap on the wrist for doing it. Doctors, as I understand it, can charge on the private side in addition to the Government payment. Is that correct?

Mr. ROSLEWICZ. Yes, they can under certain conditions.

Chairman JACOBS. Just certain conditions? Do you know anywhere they cannot?

Mr. ROSLEWICZ. Well, if they are accepting the payment under the Medicare program, they cannot go back——

Chairman JACOBS. Well, if they choose not to charge more, you are saying. They cannot charge more. But physicians under the Social Security system are free to charge; except for the freezes which have come down in recent years, they are free to charge privately in addition to what is awarded by the government. Is that not correct?

Mr. ROSLEWICZ. Yes.

Chairman JACOBS. Well, do you think that as a matter of equity we should change the law, then, with regard to lawyers and let them charge additional amounts as they choose privately from the same clients?

Mr. ROSLEWICZ. No sir. I don't think that is advisable. It would only encourage excessive fee charging. Prior to enactment of section 206(b) of the Social Security Act which limits fees in court cases to 25 percent of past due benefits there were horror stories of fee agreements calling for 50 percent of past due benefits as compensation.

Chairman JACOBS. Tom, we appreciate your contribution to the record and congratulate you on an eloquent statement.

Chairman JACOBS. Our next witness is Ms. Eileen Bradley, Associate Commissioner for Hearings and Appeals, Social Security Administration.

Ms. Bradley, if you would care to introduce your colleague.

STATEMENT OF EILEEN BRADLEY, ASSOCIATE COMMISSIONER FOR HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACCOMPANIED BY STEVEN KESSEL, REGIONAL CHIEF ADMINISTRATIVE LAW JUDGE, ATLANTA, GA

Ms. BRADLEY. Thank you, Mr. Chairman. Accompanying me is Steven Kessel, the regional chief administrative law judge for the Atlanta region, who also was the chief administrative law judge in our Tampa hearing office.

Mr. Chairman and members of the subcommittee, I am pleased to be here today to discuss the Social Security Administration's fee authorization and payment processes in Social Security disability cases.

I will summarize my formal testimony which I would request be entered into the record.

Chairman JACOBS. Right.

Ms. BRADLEY. My remarks focus on what steps the Social Security Administration has taken to date regarding fee authorization in response to the Inspector General's report, why we believe that action was necessary, and more importantly, what our plan is for the future.

I would first like to refer to the three principal objectives reflected in section 206(a) of the Social Security Act and our implementing regulations: First, to ensure that claimants who choose to be represented have access to qualified representatives, including attorneys; secondly, to ensure that any such representation is procured at a fair price in light of the need to protect claimants' economic security interest; and, finally, to ensure a source of compensation for services performed in the case of attorney representatives in Social Security cases.

The Inspector General's (IG's) report concluded that the Office of Hearings and Appeals fee authorization process has at times permitted the charging of excessive fees to claimants, and thus failed to adequately protect claimants' financial security interests as required by law. Such findings of abusive fee practices that adversely affect claimants' economic security interests compelled immediate and decisive action on our part to strengthen management of the current attorney fee process until we develop and implement the long-term reform of the entire fee authorization and payment process that we believe is strongly warranted.

Thus, on March 31 of this year, I issued a memorandum to our headquarters and field personnel modifying agency delegations of authority with respect to fee determinations. Under the revised delegation of authority, hearing office administrative law judges (ALJs) may approve fees up to $1,500 in a single case. Fees in excess of this amount may be acted on only by the regional chief judge.

We selected the $1,500 figure because the average fee for the last 3 years has been between $1,100 and $1,500, and because this threshold provides us a way to make sure that fees in excess of $1,500 are given that extra check, that extra scrutiny.

However, we are reviewing the entire fee authorization process from top to bottom. We are firmly convinced that the fee process needs fundamental reform. Our goal is to publish proposed regulations by the end of this summer, and I am pleased to have Commissioner Hardy's full support in moving forward as expeditiously as possible.

We believe that any SSA fee system must be designed to achieve two objectives: First, the fee process should produce fair, equitable and consistent fees which protect the economic security interests of claimants and which fairly compensate representatives for their services; and, secondly, the process should ensure timely reimbursement for the services performed. We seriously question whether the current system achieves either objective.

The recommended solution which the IG has proposed does not, in our opinion, adequately address our concerns about the fee approval process. No data available to us support the conclusion that $75 per hour is an appropriate rate for Social Security work generally or in all areas of the country. Furthermore, the IG's proposal does not address the issue of the legitimacy of the hours claimed by attorneys for their services, nor does it deal with our administrative concern that reimbursement be timely paid.

Improving the attorney fee process requires us to focus on two aspects: the hourly rate which attorneys should be compensated for their services; and the time that attorneys devote to client services in each case. This focus is essentially the "lodestar" approach for fee determination which some courts have adopted under various statutes. Under this approach, fees are based on the number of hours reasonably expended by an attorney in a case multiplied by a reasonable hourly rate. We believe this lodestar approach has great potential at the administrative level.

Our current strategy for revising the fee authorization payment rules includes several elements. We will propose the establishment of reasonable hourly rates for attorney compensation which reflect geographic and regional differences in prevailing attorney fees which can be adjusted due to changes in prices or wages. We seek to develop regulations to assure that the hours claimed by attorneys as services on behalf of their clients are reasonable and appropriate.

We intend to retain administrative law judge involvement in the fee determination process by having our judges review and certify services pursuant to new regulatory guidelines. We will use modern technology to expedite and, to the extent possible, automate the payment of fees.

These improvements should better protect claimants and benefit their representatives by providing greater certainty and more timely payment of approved fees.

In sum, Mr. Chairman, we believe that the interim action set forth in my March 31 memorandum was both reasonable and a necessary intervention to protect claimants until we can implement these long-term solutions. As I mentioned earlier, I am confident that we can publish proposed rules by the end of this summer. This is an ambitious goal but I believe we can achieve it.

I would be happy to answer any questions that you and your colleagues may have.

[The statement of Ms. Bradley follows:]

STATEMENT OF EILEEN BRADLEY, ASSOCIATE COMMISSIONER, OFFICE OF HEARINGS AND APPEALS, SOCIAL SECURITY ADMINISTRATION

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

Good morning. I am pleased to be here today to discuss the Social Security Administration's fee authorization and payment processes in Social Security disability cases.

My prepared remarks focus on what steps the Social Security Administration has taken to date regarding fee authorization in response to the Inspector General's Report, why we believe that action was necessary, and what our plan is for the future. Before turning to these matters, I think it would be helpful to discuss the statutory and regulatory bases for the fee authorization and payment process which applies to all Social Security cases, the vast majority of which involves disability benefits.

Fee Authorization and Payment Process

Section 206(a) of the Social Security Act authorizes the Secretary of Health and Human Services to prescribe by regulation the maximum fee that a representative may charge or collect from a claimant for services performed before the Secretary. Although the Act imposes no specific limits on an allowable fee, it mandates that when the Secretary makes a favorable determination, and the claimant is represented by an attorney, any authorized fee must be reasonable. Nor do the current Federal regulations implementing this authority specify a maximum fee; rather, they prescribe the criteria to be applied in determining a reasonable fee. These criteria include the extent and type of services that the representative performed, the complexity of the case, the amount of time spent on the case, the results achieved, and the level of review to which the claim was taken.

Any representative seeking to charge a fee for services before the Secretary must file a written petition with SSA. The adjudicator who ruled on the claim, usually an Administrative Law Judge (ALJ), then determines the fee on a case-by-case basis, bearing in mind the purpose of the Social Security program to provide a measure of economic security for program beneficiaries and applying the regulatory criteria. If either the representative or the claimant objects timely to that determination, it is reviewed by the next higher level in the organization. After this administrative review, however, there is no right to judicial review.

In addition, if a Social Security claimant was represented by an attorney and was granted benefits, the Act requires that the Secretary certify payment of the authorized fee directly to the attorney from the past-due benefits of the claimant. In administrative proceedings, that payment is the smallest of: (1) 25 percent of the total past-due benefits; (2) the amount of the attorney's fee as determined by the Secretary; or (3) the amount agreed upon by the claimant and the attorney. Notwithstanding the expectations of some attorneys, this provision establishes neither a presumption nor a standard that attorney fees will be 25 percent of past-due benefits. Rather, the withholding provision establishes an escrow account to ensure a source for payment of reasonable attorney fees. Regrettably, considerable confusion appears to exist about the intent of this provision. Some attorneys have interpreted it to establish the expectation that approved fees should equal 25 percent of past-due benefits. Our reading produces a contrary interpretation.

As we understand the Congressional intent underlying these provisions, the statute confirms the claimant's right to choose a qualified representative if representation is desired. It directs SSA to set maximum fees for services rendered, thus tying fees charged to specific services that a representative provided to a particular claimant. When that representative is an attorney and past-due benefits are payable to the claimant, the statute also ensures that there is a source of compensation for the services performed. Finally, the statute places SSA in the role of overseer, protecting the economic security interests of claimants through the requirement that fees be reasonable.

These fee provisions represent a significant workload for SSA, especially at the ALJ hearing level, where representation of claimants usually first occurs. Currently, claimants are represented in 80 percent of ALJ hearings, and in 64 percent, the representative is an attorney. At the hearing level in Fiscal Year 1970, 3,800 fee petitions were processed and $2 million in fees were authorized. In Fiscal Year 1985, 86,000 petitions were processed and $114 million in fees were authorized.

Problems with Fee Authorization and Payment

According to the Inspector General's Report, SSA's management of the fee authorization process has resulted in excessive fee approval practices. I will not repeat that discussion, Mr. Chairman. However, I wish to emphasize that SSA believes that so long as the Congress continues to maintain SSA's statutory responsibility to review, determine, and disburse fees, one instance of excessive fees that adversely affects claimants' economic security interests is one too many and cannot be tolerated. We have a statutory responsibility that we will meet.

Interim Steps Taken to Date

The Inspector General's finding that SSA was failing to protect the economic security interests of a significant number of claimants compelled immediate and decisive action on our part to strengthen our management of the current attorney fee process until we develop and implement the long-term reform of the entire fee authorization and payment process that we believe is warranted.

Therefore, on March 31, 1987, I amended the administrative delegations of authority to the ALJs so that ALJs may authorize fees up to the new limit of $1,500 in any case rather than the previous limit of $3,000. If the total fee to be approved exceeds $1,500, the fee petition and supporting documentation, including the ALJ's recommendation, must be forwarded to the Regional Chief Administrative Law Judge for action. We selected $1,500 because the average fee for the last 3 years has been between $1,100 and $1,500, and because this threshold provides us a way to making sure that fees in excess of $1,500 are clearly justified.

I have not imposed any hourly rate limit. I have not established any maximum fee per case. We have also installed a management oversight system that will ensure that this revised delegation of authority does not adversely affect processing times. I am attaching to this statement a copy of my March 31 memorandum specifying revised agency policy for the determination of fees.

SSA's Plan to Improve the Fee Determination and Payment Process

We are reviewing the entire fee authorization and payment process from top to bottom. We are firmly convinced that this process needs fundamental reform. Our goal is to publish proposed regulations by the end of this summer. I have the Commissioner's full support in moving forward as expeditiously as possible.

Any SSA system for determining and paying representatives' fees should be designed to achieve two primary objectives: (1) the fee process should produce fair, equitable, and consistent fees which protect the economic security interests of claimants and which fairly compensate representatives for their services, and (2) the process should ensure timely reimbursement for services. We seriously question whether the current system achieves either objective. Based on the Inspector General's report and on our own experience, we know that some excessive fees have been authorized, and we also know that the fee approval process has at times been cumbersome.

The solution which the Inspector General has proposed does not, in our opinion, adequately address our concerns about the fee approval process. The Inspector General proposes to amend the fee regulations to provide that "fees are acceptable up to 25 percent of past due benefits as long as they do not exceed the equivalent of $75 per hour based on a reasonable number of hours claimed by attorneys for services." This recommendation is based on the fact that $75 per hour is the standard established under the provisions of the Equal Access to Justice Act. No data support the conclusion that $75 per hour is an appropriate rate for Social Security work generally or for all areas of the country. Furthermore, the Inspector General's proposal does not address the issue of the legitimacy of the hours claimed by attorneys for their services, nor does it deal with our administrative concern that reimbursement be timely paid.

Improving the attorney fee process will require us to focus on two aspects of fees: the hourly rate which attorneys should be compensated for their services; and the time that attorneys devote to client services in each case. This focus is essentially the "lodestar" approach for fee determination which courts have adopted under a variety of statutes. Under this approach, fees are based on the number of hours reasonably expended by an attorney in a case multiplied by a reasonable hourly rate. We believe that this approach should be considered for use at the administrative level as well.

We have begun to develop regulatory specifications to establish an attorney fee process that will apply this lodestar approach to the administrative approval of attorney fees. Our current strategy for regulatory revisions and improvements in the fee authorization and payment process includes several elements. We will propose the establishment of reasonable hourly rates for attorney compensation which reflect geographic and regional differences in prevailing attorney fees and which can be adjusted based on changes in prices or wages. We seek to develop regulatory guidelines to assure that the hours claimed by attorneys as services on behalf of their clients are reasonable and appropriate.

We intend to retain Administrative Law Judge involvement in the fee determination process by having our judges review and certify services pursuant to these guidelines. We will utilize modern technology to expedite, and to the extent possible, automate the payment of fees. We expect these improvements will better protect claimants and benefit their representatives by providing greater certainty and more timely payment of approved fees.

In sum, Mr. Chairman, we believe that the interim action set forth in my March 31 memorandum is both a reasonable and necessary intervention to protect claimants until we can implement these long-term reforms. As I mentioned earlier, I am confident that we can publish proposed regulations by the end of the summer. That may be an ambitious goal, but I believe that we can achieve it.

I would close with a quote from a letter I received recently from an attorney summing this matter up nicely:

> A proper balance must be struck between protecting the public and paying reasonable attorney's fees to those representing the public.

I would be happy to answer any questions you may have.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

MAR 31 1987

MEMORANDUM TO: All Regional Chief Administrative Law Judges
All Hearing Office Chief Administrative Law Judges
All Administrative Law Judges
OHA Headquarters Executive Staff

FROM : Associate Commissioner

SUBJECT : Revised Delegations of Authority for Administrative Law Judges to Determine Fees of Representatives - ACTION

I. INTRODUCTION

Section 206(a) of the Social Security Act authorizes the Secretary of Health and Human Services to prescribe the maximum fee that a representative may charge or collect from a claimant for services performed before the Secretary. Although the Act imposes no specific limits on an allowable maximum fee, it mandates that any authorized fee must be reasonable. To protect the right and option of Title II claimants to choose attorneys as their representatives, the Act authorizes SSA to withhold up to 25 per cent of a Title II claimant's past due benefits to ensure an available source of compensation for services performed.

The Federal implementing regulations do not specify maximum fees; rather, they prescribe criteria for evaluating fee petitions and determining reasonable fees for representatives in both Title II and Title XVI proceedings. The fee so determined is the maximum fee that may be collected in that case. A primary consideration in evaluating fee petitions is the purpose of the Social Security program; namely to provide a measure of economic security for program beneficiaries. Finally, in keeping with the Act, the regulations provide for the direct payment of authorized fees to attorney representatives from the withheld past due benefits payable to the claimant in Title II actions.

In summary, both the statute and its implementing regulations reflect three principal objectives: (1) to ensure that claimants who choose to be represented have access to qualified representatives, including attorneys; (2) to ensure that any such representation is procured at a fair price in light of the need to protect claimants' economic security interests; and (3) to ensure, in the case of attorney representatives in Title II proceedings, a source of compensation for services performed.

The Office of the Inspector General has issued a recent report concluding that OHA's fee authorization process has at times permitted the charging of excessive fees to claimants and thus failed to adequately protect claimants' financial security interests as required by the statute and implementing regulations.

II. THE INSPECTOR GENERAL'S REPORT

On January 14, 1987, the Office of the Inspector General (OIG) issued a report entitled, Improvements Needed in Attorney Fee Process Could Save SSA Beneficiaries Millions. The Report concludes, among other things, that "Office of Hearings and Appeals (OHA) Administrative Law Judges (ALJ's) were generally not evaluating attorney fee petitions in accordance with regulations implementing the requirements of the Social Security Act.... As a result, a significant number of claimants have paid what appear...to be excessive fees," and thus, the agency may be failing to protect the economic security of claimants.

The Report found that the regulatory criteria for evaluating fee petitions cover the appropriate factors--extent and type of services, complexity of the case, level of skill and competence, amount of time expended, results achieved, and level of review to which the claim was taken. However, the Report also found that "instead of objectively evaluating fee petitions [under] the regulations, ALJ's were for the most part giving perfunctory approval to fee arrangements agreed to between attorneys and clients."

Although the fee authorization requirements for services before SSA and the provision allowing 25 per cent of past due benefits to be withheld for payment of attorney fees are unrelated, that is, the amount withheld is not a factor in a fee authorization, the two have in practice become intertwined. Commonly, an attorney and claimant sign a contingency agreement providing that the attorney will receive 25 per cent of past due benefits if successful; nothing, if unsuccessful. Whether or not the 25 per cent amount results in a reasonable fee appears to be a matter of happenstance. The Inspector General's Report noted that such contingency fee agreements and what the Inspector General's Office observed to be an "institutionalized reluctance by ALJs to question the judgment of fellow attorneys on the fees requested" contributed to "noncompliance with regulatory and procedural requirements" relating to attorney fee authorization.

Employing the standard established in the Equal Access to Justice Act of $75 per hour as a measure, the Inspector General's analysis of a sample of 2,000 fee petitions showed that 45 per cent exceeded $75 per hour, with 20 per cent in the $75-99 per hour range, 21 per cent in the $100-199 per hour range, 3 per cent in the $200-299 per hour range, and 1 per cent exceeded $300 per hour. The Inspector General reported one instance in which an approved fee request resulted in an hourly rate of $750. OHA Headquarters review of some fee requests has also identified fee approvals in this latter range. The Inspector General recommended that the current regulations be revised to provide that "fees are acceptable up to 25 per cent of past due benefits as long as they do not exceed the equivalent of $75 per hour based on a reasonable number of hours claimed by attorneys for services." However, the Inspector General also indicated that other alternatives might be acceptable so long as the ultimate result of "fair fees" is achieved.

III. ACTION REQUIRED

That the fee authorization and fee payment processes have been troublesome and lingering issues in SSA is generally acknowledged. In the past, the Administration submitted legislative proposals to amend the Social Security Act to delete the fee authorization and withholding provisions in the belief that private contractual arrangements between claimants and their representatives need not be regulated. Congress did not enact those proposals and has indicated very recently its continuing belief that claimants still need protection from excessive fees and the assurance of adequate access to effective representation provided by the withholding mechanism.

In addition, it has been noted in OHA, and especially by several members of the OHA Attorney Fee Panel, that the continuing growth of the fee authorization workload and the attention it should be given are detracting from the primary mission of the Administrative Law Judges; namely, to hear and decide cases.

I recognize that no easy resolution of the attorney fee issue, even on a short-term basis, may exist. But I am convinced that all of us in OHA are disturbed by the findings of the Inspector General's report, by any abusive fee practices and by any failure on our part to protect the economic security of beneficiaries.

Having carefully considered the Report and other evidence that has accumulated over time in OHA, and having reviewed the issues raised in the Report and elsewhere with the Inspector General's office and other SSA executives, I am compelled to conclude that immediate action is warranted to improve our management of the representative fee process. Indeed, the Report indicates that management action can be effective in improving the consistency and fairness of fee authorizations. Thus, I have determined that revising the current fee authorization process as set forth below is the preferred short-term course of action.

Second, I have also concluded that we must devise and implement, as expeditiously as possible, an action plan that will in the long-term, streamline the fee authorization and payment process and achieve the following objectives:

- The fee authorization process should produce fair, equitable, and consistent fees, which both protect the economic security interests of claimants and fairly compensate representatives for their services; and

- The fee authorization and payment processes should be simplified to ensure more timely reimbursement for quality services provided by representatives.

Establishment of a new system that meets these objectives will take some time and a coordinated effort among the various offices in SSA involved in setting policy, and authorizing and paying fees to attorney representatives. Nonetheless, I am committed to making this effort a priority OHA objective.

In the meantime, as an interim measure until a new system is put into place, I am amending the current determination authority regarding fees for representation of claimants (OHA Handbook 1-220/226 and Interim Circular No. 122) as follows, effective immediately:

- ALJs may authorize fees up to $1500 in any one case. If the total fee to be approved exceeds $1500, the fee petition and supporting documentation (including the ALJ's recommendation) must be forwarded to the Regional Chief Administrative Law Judge for fee authorization. In all other respects, the provisions in the Handbook and IC 122 remain in effect.

Effective execution of OHA's responsibility for administrative oversight has been clearly hampered by the lack of data concerning representative's fees. I am, therefore, instituting an interim report requirement for Hearing Office ALJs and for Regional Chief Administrative Law Judges that is consistent with reported information maintained in Headquarters as follows:

- Hearing Office ALJs: On the first working day of each month, the Hearing Office shall forward to the Regional Office copies of all fee petitions that have been authorized in the previous month.

- Regional Chief ALJs: The Regional Offices shall submit to the Office of the Chief Administrative Law Judge by the 15th of each month a Fee Authorization Report, which, using the format provided at Attachment A, reports on information on fees authorized at the Hearing Office and Regional Office levels in the prior month.

I recognize that modifying the delegations of authority imposes an increased workload on the Regional Offices. Nonetheless, to achieve consistent, uniform and equitable fee determinations, I expect that the Regional Chief Administrative Law Judges will ensure that mechanisms are in place to manage this workload effectively and that each and every fee authorization will be given appropriate consideration under the governing regulations. I have directed the Office of the Chief Administrative Law Judge to work with the Regional Chief Administrative Law Judges in instituting the Fee Authorization Report to ensure that this workload is processed efficiently and expeditiously.

This interim procedural change is not intended to protract the payment process. All fee authorizers are reminded that past due benefit information need not be available before proceeding to review a fee petition. Indeed, representatives should be reminded that fee petitions can be submitted and reviewed before past due benefit information is available. If a representative has a contingency agreement for a percentage of past due benefits, he or she will generally wait until this information is available, but the 25 per cent of past due benefits restriction concerns only direct certification of payments to attorney representatives, not fee authorization. If the representative/claimant agreement is not based on a contingency fee arrangement, fee petition review and authorization should proceed without any delay.

IV. CONCLUSION

The Inspector General's report will in the long run, I believe, prove to be extremely beneficial to all of the parties to the fee process--SSA, claimants and representatives. Authorization and payment of fees has been a nagging problem for some years; a new system that streamlines the process and employs the capability that modern technology affords would go far toward achieving our objectives of timely reimbursement for services at a fair and reasonable price.

Eileen Bradley

Eileen Bradley

Attachment

cc: Louis D. Enoff, Deputy Commissioner for Programs
Enid Borden, Deputy Commissioner for Policy and External Affairs
Donald A. Gonya, Chief Counsel for Social Security
Sandy Crank, Associate Commissioner, Office of Retirement and Survivors Insurance
Richard P. Kusserow, Inspector General

Fee Authorization Report

Report Format/Periodicity

Each Regional Office shall forward its monthly report in the following format:

Total # Requests		Total $ Amount		Total $ per Hour		Average Proc. Time in Days	
Received	Authorized	Requested	Authorized	Requested	Authorized	Dec./Auth.	Receipt/Auth.

Summarize monthly requests/authorizations for each Hearing Office. Note that two processing time measures are required; the first should be total elapsed time from the date of the ALJ decision to the date of authorization, and the second is total elapsed time from the from the day the fee petition is received in the Hearing Office to the time it is authorized in the Hearing Office (for authorizations at or below $1500) or in the Regional Office (for authorizations above $1500).

Summarize monthly initial requests/authorizations for the Regional Office.

Summarize monthly review requests/authorizations for the Regional Office.

A report summarizing the previous month's activity should be transmitted by Mailway to the Office of the Chief Administrative Law Judge by the 15th day of the following month.

Chairman **Jacobs**. Mr. Archer.

Mr. **Archer**. Thank you, Mr. Chairman.

Ms. Bradley, we hear complaints about SSA's delays in the attorney fee approval and payment process. Could you tell the committee what the average processing time is and what part of the delay would be attributed to the time it takes attorneys to submit the fee petition?

Ms. **Bradley**. We reviewed a sample of 100 cases with respect to this, and we concede that processing times are unconscionable under our current system.

With respect to the sample that we reviewed, we learned that the median elapsed time from the date of the administrative law judge's decision to the date of the fee petition was 93 days, and from the date of the fee petition to the date of fee authorization was 83 days. Problems occur at a couple of points in the process. First, attorneys delay filing their fee petitions because they are waiting to be notified about the size of the past-due benefits. Other Social Security components must compute what the past-due benefits are. And when we do remind the attorney that the fee petition must be filed, it then comes into the hearing office where there are some delays, admittedly, in processing those fee petitions.

So the entire process takes about 6 months, although I am sure there are egregious instances of even longer times before attorneys are paid.

Mr. **Archer**. We have had a lot of complaints about the attorney fee petition process. I would like to have your perspective on it. You have given us some general comments.

How many fee petitions does SSA process in a year, and how many requests for further review does SSA receive?

Ms. **Bradley**. The number of fee petitions we process each year obviously varies. In fiscal year 1985, the Office of Hearings and Appeals processed approximately 86,000 fees and authorized $114 million in fees. In fiscal year 1986, because of the moratorium on continuing disability reviews—which obviously reduced the hearing case load in 1984 and 1985 and the number of fee petitions which would come along later—we processed approximately 65,000 fee petitions and authorized approximately $92 million in fees.

With respect to requests for administrative reviews, the figure has been fairly consistent over the past 10 years. There are requests for administrative reviews of only about 3 percent of all fee petitions processed annually.

Mr. **Archer**. Did the Inspector General's data indicate that excessive fees authorized by the ALJs are the norm or are they the exception?

Ms. **Bradley**. No, the Inspector General's report, in fact, indicated that the average fee authorized was $71 per hour, that 55 percent of the fees were below $75 an hour, and only 45 percent exceeded the $75 hourly limit or standard that the Inspector General's office employed.

Obviously, when you have a $71 hour average and about 55 percent are below $75 per hour, a considerable number of fees were, in fact, below $71 per hour.

Mr. **Archer**. So when you say a $71 average, is that an arithmetic mean average, a mode average?

Ms. **Bradley**. I would have to defer to the Inspector General on the statistical methodology employed in that respect, Mr. Archer.

Mr. **Archer**. Do you agree with the IG's conclusion that rates above $75 an hour are excessive? Does that standard take variation in office overhead into account?

Ms. **Bradley**. An hourly limit of $75, or any other hourly limit, may be an appropriate element of a regulatory structure. I believe our concern with respect to the $75 per hour that the Inspector General has recommended we adopt is that it does not or may not take into account cost of living, the prevailing attorney fee rates in various parts of the country.

For example, in large metropolitan areas, a $75 per hour fee standard may not enable a claimant to obtain competent counsel.

Mr. **Archer**. Should it also, perhaps, be adjusted based on the complexity of the case? Do you think in your opinion that there would be justification for a fee in excess of $75 an hour because of the complexity?

Ms. **Bradley**. The approach that we are proposing, Mr. Archer, would avoid some of these subjective elements and would provide more precise and objective fee determinations.

First, when we are speaking about establishing prevailing geographic based rates, devising some kind of formula with respect to what comprises reasonable hours for various parts of the services that attorneys perform, and then requiring a certification by the administrative law judge who heard the case that, indeed, these services were performed. I think then we can avoid some of the problems that the IG has reported on and our own records reveal where we have arguably vague and imprecise guidelines that invite subjective reviews and subjective determinations, and regrettably have resulted in egregious fees in some instances and excessive fees in others.

Mr. **Archer**. How did you determine that $1,500 should be the threshold for fee approval at the ALJ level? We have had a lot of complaints when the threshold was reduced from $3,000 to $1,500. Attorneys do not want to participate for fear that additional time for a second review just made the process unjustifiable.

Ms. **Bradley**. As I mentioned in my remarks, the reasons that we identified $1,500 as the threshold followed a review of the average fees that had been awarded over the course of the past 3 years. They ranged between $1,100 and $1,500, and even as late as last fiscal year, they just came close to the ceiling of $1,500.

It was our belief, based on the average fee, and the fact that the substantial majority of the fees fell below the $1,500 level, that we would be installing an extra check on those fee petitions that might involve excessive fees.

With respect to the additional time argument, we have installed a management system which will involve monthly reports, almost day-to-day oversight. I have enunciated this priority to our field personnel in terms of speedy processing of fee petitions. Quite frankly, Mr. Archer, I am hopeful that by virtue of our pressing on this particular matter, focusing on it, making it a priority, that we will reduce overall processing times.

Mr. **Archer**. Are there any exceptions to SSA's requirement that claimants' representatives must submit a fee request for approval?

Ms. **Bradley**. There are a couple of exceptions, and they relate basically to where a Federal, State, or local governmental entity, or a nonprofit organization funded or administered by a government entity, would engage an attorney to represent a claimant, but where the liability for the attorney fee or expenses would rest with that governmental entity or nonprofit organization and not with the claimant or beneficiary benefits.

Mr. **Archer**. What percent of the cases are excluded from the process?

Ms. **Bradley**. I can furnish that for the record, sir. I do not have that information available.

[The following was subsequently received:]

We do not have data on how many cases involve claimants who are represented by governmental entities or nonprofit organizations which are not required to submit a fee request for approval. However, we estimate that these cases are a very small percentage of all cases involving representation.

Mr. **Archer**. Should your criteria, in your opinion, be expanded to include other third parties; for example, long-term disability insurance carriers who absorb the cost of representation directly or indirectly?

Ms. **Bradley**. We will be examining as part of the development of the proposed rules whether it is efficacious to extend that exception to the kinds of entities that you have mentioned.

I think what we have to do as we reexamine the policy in this area and see whether it merits revision is determine whether the claimant employs a representative and incurs a liability for paying a fee, or whether a third party assumes liability for paying the fee.

Mr. **Archer**. Finally, what is your view on the argument that SSA ought to take contingency fee agreements into account so that you would have an averaging out of the winners and the losers? Although the winners would perhaps pay higher fees there would be an awful lot of claimants who would be charged no fee at all. In other words, the winners would subsidize the losers.

Ms. **Bradley**. I think the argument most frequently offered to justify the contingent fee is that, as you have pointed out, contingent awards reimburse attorneys not only for their successes but also compensate them in some measure for unsuccessful cases in which no fee is requested or paid.

According to this argument, contingent fees enable attorneys to represent clients in cases where the chance of success is not good, and thus the availability of the attorney for representation to the public is increased.

The argument admits a priori that fee awards in any successful case may exceed the value of the attorneys' services in that particular case, and further admits that in the aggregate the amount of the attorneys' fees in successful cases exceeds the value of the attorneys' services.

In short, contingent fees require successful beneficiaries to subsidize attorneys for their unsuccessful efforts. We believe this type of arrangement raises serious questions under the Social Security Act and the regulations which clearly require a fee award in any one case to be determined on the value of the attorney's service in that particular case.

Moreover, we believe it is inequitable for claimants to be required to surrender benefits intended to replace lost income, and which should be utilized to pay for necessities such as housing and medical care, to attorneys as subsidies for their unsuccessful representation efforts.

Under the law and the regulations, SSA has responsibilities not just to collect and disburse moneys, but rather to review and to disburse the fees. The fact that the law authorizes SSA to withhold up to 25 percent as an escrow account to compensate attorneys should not be deemed to establish an expectation that approved fees should equal 25 percent of past-due benefits by the statutory and regulatory standards under which we are now operating.

The law expects SSA to look behind the attorney/client agreement by virtue of requiring us to review the fee petitions. Thus, the contingency fee agreement, once that fee petition is filed, loses some relevance insofar as the fact that we in our role as overseer and protector of the economic security interests of the claimants may, in fact, set aside that contingency fee agreement. We are authorized to do so.

We do not believe that the law authorizes us to abdicate our duties in this regard and merely to sanction contingency fee agreements that attorneys and clients have reached. In fact, as was pointed out earlier, the Congress' insistence on maintaining SSA's involvement in the process suggests that it has an equal concern in this area to ensure a check and balance on fees.

The fact I really want to emphasize is that the benefits to which an individual has been declared to be entitled are the source of payment for the attorney fee. In regard to the successful claimant who paid into the social security trust funds, and who on his or her own merits and particular situation was declared to be entitled, I think there are serious public policy and equity questions as to whether that individual's benefits should pay for other unrelated and unsuccessful claimants' costs in pursuing the administrative and judicial process.

Mr. ARCHER. Thank you. Thank you, Mr. Chairman.

Chairman JACOBS. Your $1,500 rule, does it apply to cases already pending, or is it prospective?

Ms. BRADLEY. It was effective as of March 31, so it would apply to all fee petitions that would be filed pursuant to March 31.

Chairman JACOBS. Pursuant or subsequent?

Ms. BRADLEY. Subsequent.

Chairman JACOBS. Subsequent to March 31. So any petition that was filed prior to that time, and might be in the pipeline, would not come under the purview of your new regulation, is that correct?

Ms. BRADLEY. We, we believe that currently what is happening in the field and, quite frankly, what I would encourage is that any fee petition that was still in the pipeline and had been sitting there should come under that March 31st memorandum.

Chairman JACOBS. So it's not prospective?

Ms. BRADLEY. It's prospective in terms of what the intent in establishing that memorandum happened to be. However, I would not discourage our field personnel from applying that memorandum to fee petitions that were in the pipeline at that point in time.

Chairman JACOBS. That strikes me as a little imprecise for a regulation.

Ms. BRADLEY. It is not a regulation. I do want to point that out. It is an internal rule in procedure concerning how we manage the attorney fee process.

Chairman JACOBS. That's a little imprecise even for that, isn't it, for a policy? You would encourage them to—it seems to me you would either say they do it or they don't.

Ms. BRADLEY. We have said that it became effective March 31, so it would be prospective. I will be precise. Things are on the record.

Chairman JACOBS. Yes. And I think we have to define prospective because I have heard it three ways.

Ms. BRADLEY. That would be fee petitions filed after March 31.

Chairman JACOBS. But you would encourage your people to review fees above $1,500 where the petitions had been filed before March 31 as well. Is that true?

Ms. BRADLEY. We would not object.

Chairman JACOBS. Do you want to stand on that answer?

Ms. BRADLEY. Not really, sir. I'll take it back. [Laughter.]

No, Mr. Chairman. What I am saying is that it was effective for fee petitions filed after March 31.

Chairman JACOBS. Yes. Well, you encouraged people to violate that policy and review the ones before, is that what you are saying?

Ms. BRADLEY. No, sir.

Chairman JACOBS. I don't mean to be unkind.

Ms. BRADLEY. No, sir. I appreciate that. No. I think I got tripped up in "prospective" and "retrospective" and "pursuant."

Chairman JACOBS. Okay. So, in essence, we are talking about any petition filed before. Petitions filed prior to that date would——

Ms. BRADLEY. Would operate under the prior delegations.

Chairman JACOBS. Right. The old arrangement.

Now, have you any experience so far with this review?

Ms. BRADLEY. Yes.

Chairman JACOBS. How is that coming along? Have there been reductions generally? Have you any data on that?

Ms. BRADLEY. No. We have no data to suggest that it has invited any massive reductions in fees authorized or anything of that nature. It has really only been in effect for a very short period of time.

We had about one month's worth of information, and it would suggest that in the main we are not authorizing fees in any different fashion than we have done in the past.

Chairman JACOBS. Right. Thank you.

Mr. Levin, did you have any questions?

Mr. LEVIN. No. I'm sorry. I was too late.

Chairman JACOBS. Do you have any answers? [Laughter.]

Well, Ms. Bradley, we are very grateful for your contribution to the record, grateful to you and to your associate. Thank you very much for coming in.

Ms. BRADLEY. Thank you.

Chairman JACOBS. Our next panel includes a representative of the American Bar Association, Sara-Ann Determan, commissioner, Commission on Legal Problems of the Elderly; as well as the Organization of the National Senior Citizens Law Center, Ms. Eileen Sweeney; and the Save Our Security Coalition, and Mr. William Bechill is representing that organization.

You all know the rules of the New York State Athletic Commission, I mean the 5-minute rule and so on. And you would be kind to your successor witnesses if you would scrupulously observe that. Perhaps other points might be brought out in the questioning.

Please proceed, if you care to, in the order in which you are listed.

STATEMENT OF SARA-ANN DETERMAN, COMMISSIONER, COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY, AMERICAN BAR ASSOCIATION

Ms. **Determan**. Thank you, Mr. Chairman, members of the committee. Good morning.

My name is Sara-Ann Determan. I am a member of the American Bar Association's Commission on Legal Problems of the Elderly, and a partner in the D.C. law firm of Hogan & Hartson. I am here at the request of the ABA president, Eugene Thomas, to express the association's views on attorneys' fees in proceedings before the Social Security Administration.

The ABA is very concerned about the current crisis facing Social Security disability claimants because of their inability to obtain counsel. High quality representation for these claimants is absolutely crucial if they are to prevail in their disability claims. You are aware of the studies that show the high reversal rate where claimants are represented.

For this reason, the ABA strongly opposes any action by the Social Security Administration which has the result of further discouraging members of the private bar from representing these clients.

The ABA Commission on Legal Problems of the Elderly was created to analyze and respond to law-related needs of older Americans, a critical one of which is ensuring competent representation before the Social Security Administration in disability proceedings. This has long been an ABA priority because of two well-documented facts of which you are fully aware.

First, there is a serious shortage of attorneys available who are willing to represent Social Security disability claimants; and, second, reversal rates are much higher for claimants who have such representation.

We believe that very large numbers of claimants may not be receiving the disability benefits to which they are clearly entitled under law because they were unrepresented. And an untold number of these claimants were not represented by counsel because they could not find attorneys willing to take their cases.

This shortage of attorneys is well documented. The ABA's Special Committee on Federal Limitations on Attorneys' Fees studied the effect of regulation of attorneys' fees and the availability and adequacy of competent private counsel, focusing particularly on the Veterans' Administration and the Social Security Administration.

The committee concluded that relatively few attorneys are willing to practice in these areas precisely because of the highly regulated fee structures.

As a result of this shortage of attorneys, the ABA's Commission on Legal Problems of the Elderly for years has actively has encouraged pro bono and reduced fee representation of claimants by the private bar. And the private bar has made, and continues to make, substantial pro bono contributions of legal services to such clients. Many State and local bar associations have established special Social Security referral panels, most of which operate on a reduced fee or on a no fee basis. Legal Services Corp. funded programs, and title III, Older Americans Act funded programs also have worked to involve the private bar in pro bono or sharply reduced fee representation.

Yet, the ABA's information from both the private bar and Legal Services programs indicates that the need is far from met and is, in fact, growing.

Legal Services and Older Americans Act programs are overburdened, and many have lost funding in whole or in part. Many of their cases are thus being shifted to the private bar and to pro bono attorneys.

Pro bono representation, however, was never meant to take the place of compensated legal services, only to supplement it. Indeed, there are numerous areas in which private lawyers provide pro bono representation, Social Security cases constitute only a relatively small percentage of such pro bono cases.

Moreover, as you know, the Secretary of Health and Human Services has begun its continuing disability review of Social Security and SSI recipients. It is expected that thousands of claimants will lose their benefits over the next year, and the problem of lack of attorneys to represent them will become even more critical.

Claimants of all income levels are relying more and more on the private bar for representation. It is critical, therefore, that the Secretary do nothing that will discourage the Social Security bar from practicing.

There already are significant disincentives. It is not a lucrative area of practice. Most attorneys who practice in this area do so because ~~the~~ opportunity to significantly improve a client's life offers both personal and professional rewards.

As you are aware, the clients can be difficult. Many of them are seriously ill, incompetent or mentally disabled, and virtually all have other significant problems in their lives engendered by their precarious financial situations.

Moreover, competent representation requires a thorough knowledge of many arcane, technical, and ever-changing Social Security regulations, rulings and court decisions.

Every attorney specializing in this area also must be conversant with medical terminology and be able to interpret medical reports and stay current with new medical technology.

For most claimants, their disability claims are the most important, if not the only, cases they will ever have. In light of the complexity of the law, even the most well educated and intelligent claimants are jeopardizing their claims by representing themselves. And for those most in need of representation—the elderly, the mentally disabled and the incompetent—the importance of counsel is obvious.

This dwindling pool of highly specialized practitioners puts them in the endangered species category. For that reason, the ABA strongly opposes any arbitrary and unreasonable limitations upon attorneys' fees for services rendered in proceeding before administrative agencies and Federal courts.

The association would welcome the opportunity to study and comment on any proposals that may, as a result of these hearings, be developed by your subcommittee.

Thank you for the opportunity to appear before you today on behalf of the ABA. I would appreciate my written statement being placed in the record.

[The statement of Ms. Determan follows:]

STATEMENT OF
SARA-ANN DETERMAN, COMMISSIONER
COMMISSION ON LEGAL PROBLEMS OF THE ELDERLY
ON BEHALF OF
THE AMERICAN BAR ASSOCIATION

Mr. Chairman, members of the Committee, my name is Sara-Ann Determan. I am a member of the American Bar Association's Commission on Legal Problems of the Elderly and a partner in the D.C. law firm of Hogan & Hartson I am here at the request of the President of the American Bar Association Eugene Thomas, to express the Association's views on attorneys' fees in proceedings before the Social Security Administration.

The Commission on Legal Problems of the Elderly was created in 1978 by the ABA Board of Governors to analyze and respond to law-related needs of older Americans, one of which is ensuring competent representation before the Social Security Administration in disability proceedings.

This has long been a priority for the ABA as well as the Commission because of two well-documented facts.

First, there is a shortage of attorneys available who are willing to represent Social Security disability claimants; and second, reversal rates are much higher for those claimants who have attorney representation.

In 1986, only 49% of all claimants were represented by attorneys at their disability hearings. Of that 49%, 60% had their cases reversed by the ALJs, as compared to only a 36.3% reversal rate for those unrepresented by counsel. (Social Security Administration, Office of Hearings and Appeals, Jan. 1987)

The frightening conclusion of this analysis is that enormous numbers of claimants may not be receiving the disability benefits to which they are entitled because they were not represented by counsel. And an untold number of these claimants were not represented by counsel because they could not find counsel.

This shortage of attorneys is well documented. The ABA convened a Special Committee on Federal Limitations on Attorneys' Fees to study the effect of regulation of attorneys' fees in the federal administrative process on the availability and adequacy of competent private counsel. Focusing particular attention on the Veterans Administration and the Social Security Administration, the Committee concluded that relatively few attorneys practice in these areas precisely because of the highly regulated fee structures.

As a result of this shortage of attorneys, the Commission on Legal Problems of the Elderly for years actively has encouraged pro bono and reduced fee representation of these claimants by the private bar. Towards this end, the private bar has made and continues to make substantial pro bono contributions of legal services to meet the needs of social security claimants who would not otherwise have legal counsel. Many state and local bar associations have established special social security referral panels, most of which operate on a reduced fee basis. Legal Services Corporation-funded Programs and Title III Older Americans Act-funded programs have worked to involve the private bar in pro bono representation as part of their legislative mandates.

Yet our information from both the private bar and legal services programs indicates that the need is far from met and is in fact growing. Legal Services and Older Americans Act programs are overburdened, many have lost funding, and many of their cases are being shifted to the private bar and pro bono attorneys. Pro bono representation, however, was never meant to take the place of legal services -- only to supplement it. Indeed, there are numerous areas in which private lawyers provide pro bono representation, and social security cases constitute a relatively small percentage of these cases.

Additionally, the Secretary of Health and Human Services has begun its continuing disability review of social security and SSI recipients, which is expected to result in thousands of claimants losing their benefits over the next year.

As a result, claimants of all income levels are relying more and more on the private bar for representation. It is critical, therefore, that the Health and Human Services Secretary do nothing that will discourage the social security bar from practicing.

Significant disincentives already exist in this field for attorneys. It is most definitely not a lucrative area of practice. Most attorneys are drawn to this area because the opportunity to significantly improve a person's life offers both personal and professional rewards. The clients can be difficult. Many of them are seriously ill, incompetent, or mentally disabled and virtually all have other significant problems engendered by their precarious financial situations. Competent representation requires a thorough knowledge of the many technical and ever-changing regulations, social security rulings and court decisions. Every attorney in this area also must be conversant with medical terminology and be able to interpret medical reports, and must stay current with new drugs and medical technology.

For most claimants, their disability claims are the most important cases they will ever have. Even the most well educated and intelligent claimants are jeapardizing their claims by representing themselves because of the complexity of the law. And for those most in need of representation -- the elderly, the mentally disabled, the incompetent -- the importance of counsel is obvious.

The Secretary also benefits from competent counsel. Attorneys help the ALJs to develop the record. Many private attorneys arrange for medical examinations for their clients, taking that burden and expense off the Secretary. Attorney involvement can expedite the proceedings at all levels of the process, which will make the system run more smoothly.

The dwindling pool of these highly specialized practitioners puts them in the same category as an endangered species. For that reason, the American Bar Association strongly opposes any arbitrary and unreasonable limitations on attorneys' fees for services rendered in proceedings before administrative agencies and federal courts. The Association would welcome the opportunity to study and comment on any proposals that may, as a result of these hearings, be developed by your subcommittee concerning the award of attorneys' fees in social security cases.

Thank you for the opportunity to appear before you today on behalf of the American Bar Association.

Chairman JACOBS. Yes.
Ms. Sweeney.

STATEMENT OF EILEEN P. SWEENEY, ATTORNEY, NATIONAL SENIOR CITIZENS LAW CENTER

Ms. SWEENEY. I am Eileen Sweeney. I am an attorney at the National Senior Citizens Law Center, which is a legal services program. I work only on Social Security and supplemental security income issues. And as a result, I work a great deal with both legal services attorneys and members of the private bar.

I am very aware of the importance the private bar has served in ensuring that eligible disabled people receive their benefits.

Many individuals with disabilities suffer from mental impairments, functional illiteracy, and conditions which impair their ability to concentrate. Regardless of how well educated a person is, it is highly unlikely that he or she can effectively present a complete case before SSA due to the complexity of the standards and the evidence required.

It is virtually impossible for anyone, except an experienced advocate, to ascertain all the hoops and obstacles one must jump through or overcome while attempting to establish eligibility or continuing eligibility.

On page 2 of my statement, I provide nine examples of the complexity of the process. These are the first nine that came to mind. It is a very modest list, but I think it gives you some sense of just how difficult it would be for somebody to represent themselves in this process.

In addition to the complexity, SSA still persists in failing to adhere to many decisions of the Courts of Appeals. There are also numerous problems with implementation of the 1984 amendments. Further, recent issuances suggest that there are profound problems with the quality, accuracy and timeliness of decisions.

For example, the California Auditor General has found that the State's DDS rigged its random sample that it sends to SSA to have performance ratings determined. I have submitted the document to the subcommittee.

SSA itself has issued a memo questioning whether or not many of the mentally impaired people whose cases are currently being denied should really be allowed. That memo is just about a month old. I think it's a remarkable memo coming from the administration, and it was from one Associate Commissioner to another in SSA. And it just emphasizes how critical it is that there be representation of these individuals,

SSA is also cutting back in assisting people in obtaining evidence. A memo from the Chicago region, which indicated that disabled people have to come in and take their applications home and fill them out, also indicated that SSA was trying to improve the responsibility of disabled people to get their own evidence of record so as to, I think it was, to involve them more in the process.

The problem is that for many people it is very difficult to secure that evidence. It takes an attorney to know how to even get the evidence of a doctor or a clinic or a public hospital. In many cases, it simply isn't going to be available. There is no way at this point, with SSA cutting back on that type of assistance, that one could very well do it without representation.

In addition, SSA is currently sitting on thousands of notices which, as I understand it, have not been issued only because they don't have anybody to mail them, which is obviously a staffing cut issue.

There is a statement from Wendy Hungerford, who is an AFGE representative, indicating that she saw 127,000 notices that were dated and had not been issued. Some of them are favorable decisions, some of them are not, they are all disability decisions. We know that there are thousands of these cases and notices about to be issued, probably with incorrect dates on them, which are going to require representation to get that corrected.

SSA is sitting on all sorts of notices which, when they are issued, will result in the demand for representation being very, very high over a very long period of time.

At pages 5 to 9 of my statement, I discuss some of the problems we have seen in the judicial process in dealing with the Social Security Administration. Basically what I tried to do was to give you examples of the cases, of what the district courts have been saying, and what the courts of appeals have been saying about SSA's behavior in the court, and how they deal with the courts. The courts have generally been totally outraged with the Secretary and the behavior of his attorneys.

It takes an experienced attorney in dealing with SSA to be able to effectively represent individuals and get their benefits in any type of timely fashion out of the system.

The bottom line is that without comprehensive reforms in the area of attorney's fees, both title II and SSI, SSA will have succeeded in driving competent attorneys away from these cases at just the time when the people are going to need them most.

I urge the subcommittee to seriously consider the proposals being presented by Nancy Shor of NOSSCR today and to also act immediately to pass H.R. 2312, which returns SSA to the rules it had in effect before March 31st, 1987, for at least a short period of time.

Passage of H.R. 2312 will provide the Congress with the chance to more fully consider a comprehensive package while assuring that disabled people still have access to competent representation.

One last point. I think it is very tempting to view this as a greedy attorney issue. That simply isn't the case here. These attorneys can and will practice in other areas of law. They can make a lot more money in other areas of law than they do representing Social Security disabled individuals. The victims here are really the disabled, not the attorneys.

To have SSA coming here today and telling you that they are very concerned that people are not going to have all their money available to pay their mortgages or to pay for their food is really a remarkable position for them to be taking when, without the attorney representation, they would have zero money, and they would have all those debts as well.

I think it is very important that the Congress structure a system that assures that the abuses are taken care of, and there is no question that there are some abuses. But to run a whole system based upon the abuses, rather than to create exceptions for those abuses is absurd.

[Exhibits furnished by Ms. Sweeney have been retained in the committee files. The prepared statement follows:]

TESTIMONY OF

EILEEN P. SWEENEY

NATIONAL SENIOR CITIZENS LAW CENTER

I am Eileen Sweeney, an attorney at the National Senior Citizens Law Center (NSCLC). Thank you for inviting me to testify today on this very important issue.

NSCLC is a national legal support center funded largely by the Legal Services Corporation. We work with legal services advocates and members of the private bar in addressing the legal problems of their low-income elderly and disabled clients. I work exclusively on Social Security and Supplemental Security Income (SSI) issues.

The purpose of my testimony today is to discuss the critical role which competent representation serves in the disability adjudication process. SSA has made a decision, I believe consciously, to attempt to rid itself of private attorneys. Unfortunately, this appears to be consistent with SSA's policies in grudgingly implementing (or not implementing at all) the many improvements included in the 1984 Disability Benefits Reform Act.

A. Why Is Competent Representation So Important?

The answer to this question turns on a number of factors: (1) the characteristics of the applicants and beneficiaries of the Social Security and SSI programs; (2) the complexity of the standards and procedures which are utilized; and (3) the on-going problems with adjudicating cases, including SSA's continuing failure to follow many court decisions, its failure to adhere to (or even implement) many of the provisions of the 1984 Act, and its recent pronouncements and actions suggesting a new round of problems in the DI program.

My statement also discusses, in detail, a fourth point, that attorney representation in federal court is critical.

1) Characteristics of the population: Obviously, the Social Security and SSI populations include a wide diversity of individuals. Despite this, some factors are clear:

a) Many of the individuals seeking benefits suffer from mental impairments and are not able to represent themselves.

b) Many individuals are either illiterate or have educational levels suggesting that, even if the system were not complex, they would not be able to represent themselves. The Secretary has recognized the functional illiteracy level of many SSI recipients. In 1981, in response to litigation, the Social Security Administration proposed changes in its notice of overpayment sent to SSI recipients. 46 Fed. Reg. 42337 (August 20, 1981). The purpose was to "increase SSI applicants' and recipients' awareness of administrative procedures so that they can make informed, knowledgeable and voluntary decisions in the critical area of SSI appeals." Id. at 42338. The changes were based on conclusions that "approximately 70 percent of the individuals in the SSI population have not completed the eighth grade. Of this percentage, about 30 percent had not finished the fourth grade." Id. Further, "if 70 percent of the SSI recipients dropped out of school at or below the eighth grade, it is fairly safe to estimate their maximum functional literacy skills at between a sixth and seventh grade level." Id. However, SSA noted that the "literacy lag" for welfare recipients may be even worse, often four years less than the level of schooling last obtained. Id.

While the Secretary's 1981 statement focused only on SSI recipients, the same problems exist for many DI applicants and recipients as well.

c) Many suffer from impairments which create great pain and severely reduce their concentration and ability to assist themselves.

d) Regardless of how well-educated a person is, it is highly unlikely that s/he can effectively present a complete case before SSA, due to the complexity of the standards and evidence needed.

2) **The complexity of the standards and procedures**: SSA has created a very complex web of standards and rules for use in the disability adjudication process. It is virtually impossible for anyone, except an experienced advocate, to ascertain all the hoops and obstacles one must jump through or overcome while attempting to establish eligibility or continuing eligibility. The emphasis varies markedly from case to case. For example, it is unlikely that more than a handful of disabled individuals could know:

-- to submit evidence of the precise nature of his/her job responsibilities at past jobs, so that SSA will be better able to assess whether s/he can perform the past work;

-- that, under SSA's version of the medical improvement standard, SSA only looks at the same impairments the person had at the time of the last favorable decision, not at any impairments more recently developed, ignoring the "whole person" and that his/her overall condition has substantially worsened;

-- that, if an ALJ asks a vocational expert the wrong hypothetical, it is possible to cross-examine and correct the hypothetical;

-- that the treating physician's statement that the person is "disabled" means nothing if it is not substantiated with test results and specific diagnoses;

-- that, if a person has non-exertional limitations, such as pain, mental problems, or manipulative problems, the medical-vocational guidelines should not be applied to decide the person's case;

-- that it is possible (albeit rare these days) to establish that a person's impairment is medically equivalent to an impairment in the listings;

-- that it is possible to have tried to work but have been unsuccessful and therefore be credited with "an unsuccessful work attempt" rather than terminated from the rolls;

-- that it is possible that SSA is applying a different test or standard than it is supposed to under the court orders in the circuit where the person resides;

-- that there are sometimes policies or rules applied in cases that no one outside SSA knows about.

This is a modest listing of a few examples. In fact, there is an endless supply of these types of issues. They arise in virtually all disability cases. If a person has lost at one level before SSA, it becomes critical that that person obtain representation in order to assure that the correct rules are applied and all of the necessary documentation is supplied to SSA.

3) **Persistent problems in administration plague this program**: In addition to SSA's continuing problems in failing to adhere to circuit courts of appeals precedents ("non-acquiescence"), there are numerous problems with SSA's implementation of the 1984 Act. In addition, recent issuances suggest profound problems with the quality, accuracy, and timeliness of decisions.

A few recent, rather bewildering, examples suggest the magnitude of the problems and must undermine any idea that attorneys are not critical to the disability adjudicatory process:

a) SSA performance reviews tainted: In a letter and report,[1] dated February 19, 1987, Thomas W. Hays, Auditor General of California, found that the California DDS staff "have been interfering with the sampling procedures used to randomly select cases for quality assurance review" by SSA, taking out cases with errors. "As a result, the number of errors that the division makes in determining the medical eligibility of California residents for disability benefits is understated. Branch officials within the division were aware of and condoned the practice of substitution."

The report discusses the findings and states that, "All but one of the five branches initiated the practice of substituting sample cases within the last 18 months. The fifth branch, Los Angeles West, has had for several years a policy of making substitutions under special circumstances." The report attributes the practice to:

A. The "strong sense of competition" in the disability program. It notes that California has been ranked in the bottom half until recently, when it went into the "top 10."

B. "The branch staff's lack of regard for the performance rating that measures two components of performance--the accuracy of decisions and the thoroughness of documentation to support decisions."

C. "Management's lack of incentive to uncover improper practices that inflate performance ratings. Staff and management at the branch, state, and federal levels all benefit from high performance ratings that reflect favorably on the disability analysts and on overall program management. Both the department and the regional office of the Social Security Administration received the letter that prompted our investigation of this complaint. After conducting cursory investigations, the division official and an official of the Social Security Administration concluded that there was no substance to the complaint."

Given the seriousness of this problem, it would be inappropriate for the Congress to place any reliance upon any statements by the Secretary that SSA's quality assurance and performance review procedures suggest that the cases of disabled individuals are being properly adjudicated.

b) SSA itself questions quality of adjudications in cases involving mental impairments: In a March 24, 1987 memo from Associate Commissioner for Assessment to the Associate Commissioner for Disability, entitled "Impact of the Revised Listings for Mental Disorders--Information," SSA suggests that there are many people with mental impairments whose cases are being denied illegally. In the cover memo, the author states:

"This evaluation underscores prior findings from QA [quality assurance] body system reports that DDS accuracy under the revised listings has deteriorated markedly, particularly among decisions unfavorable to the claimant."

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[1] This document and other documents referred to in this statement have been submitted to the Subcommittee, as provided for in the Ways and Means Committee rules.

And, in the report itself, Associate Commissioner Bedwell states:

"In FY 1985, about 70 percent of the QA denials returned to the DDSs were reversed to allowances. If similar reversal experience applies to the QA mental denials, it would suggest that a large number of DDS mental denials should be allowances."

c) There is about to be a deluge of decisions issued: An SSA union representative has written a statement describing what she has seen and learned about how SSA is handling the issuance of notices in the disability program. ("Statement of Wendy Hungerford, Vice President, AFGE Local 1923, AFL-CIO," dated April 25, 1987.) The problems appear to apply to both favorable and unfavorable initial decisions, continuing disability reviews and decisions that overpayments exist in disability cases.

Ms. Hungerford states that in March 1987, SSA has holding 127,000 notices, already dated, because it did not have the staff to get the notices mailed. This memo is important for three reasons:

A. It provides another indication of the severity of the impact of SSA's staffing cuts. (The notices are not being mailed because there is not adequate staff to issue them.)

B. It raises serious questions about the validity of the dates on the notices that clients are receiving and will be receiving. (For example, on March 25, 1987, Ms. Hungerford saw a notice dated February 18, 1987 that had not yet been mailed.)

C. When SSA does issue these notices, it is likely to occur all at once, creating an incredible need for competent representation all at once. It will be critical that disabled individuals have access to both legal services and the private bar at that time.

d) We have only just begun to seek the termination decisions of people re-reviewed under the 1984 amendments. The complexity of these cases is astounding. Under SSA's scheme, if a person was first found eligible in 1978 and received a termination decision in 1983, SSA is applying the 1984 Act medical improvement standard by comparing only the impairments the person had in 1978 with those same impairments in 1983. If there was no medical improvement related to ability to work, and none of the exceptions apply, SSA will still only pay the person if it decides that s/he has been continuously eligible until the present time, four years later.[2] There is no way that a disabled person could understand this process without the benefit of competent counsel.

e) SSA is cutting back on what efforts it previously made to assist the disabled in documenting their cases. Despite the emphasis of the 1984 Act and the 1985 revisions to the mental impairment listings, SSA is very clearly backing away from its obligations to assist disabled people in documenting their impairments. For example, in a Chicago regional memo, SSA has indicated that it is requiring disabled people to secure more of the evidence themselves. This is often difficult or impossible. In addition, state DDSs are beginning to cut back on services such as the telephonic dictation systems. These systems have permitted consultative examiners and treating physicians to call in their reports. The DDS staff would then transcribe the report. Elimination of this service, which so clearly facilitates the goal of fully developed records, will further seriously undermine the quality of SSA case files and SSA decisions.

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[2] Both the manner in which the standard is applied and the payment scheme appear to violate the 1984 Act.

At the same time, they are also cutting back sharply on the use of consultative examiners (CEs). If done correctly, this might be desirable as it would possibly improve use of treating physician evidence. Instead, CEs are not being used in cases where they are critical: for the low-income disabled person who has been seen only in clinics and has very little documentation. No effort is being made to assure that CEs are provided in these cases, where they are most needed.

4) **Additional problems upon judicial review:** So far, my testimony has focused on problems in the administrative process. Many of these issues carry over into federal court representation. There, attorney representation is also critical. While this is true for all the reasons stated above, there are additional factors related to the quality of the Secretary's performance in the courts.

In recent years, SSA has frequently ignored court orders and procedures and has generally proceeded in such a shoddy fashion before the federal courts, that numerous courts have taken the extraordinary step of voicing their criticisms of the government's behavior. Their criticisms focus not only on SSA's disregard of court procedure and court orders but also recognize SSA's generally negligent attitude regarding resolving substantive issues within its own appeals process.

a) Failure to follow federal court rules and violations of Fed. R. Civ. P. 11: There are numerous examples of SSA's failure to follow basic rules of procedure.

In Stone v. Heckler, 722 F.2d 464, 466 fn.2 (9th Cir. 1983), HHS failed to follow the Ninth Circuit Court of Appeals Rules of Appellate Procedure. The Ninth Circuit stated:

"The government has been singularly unhelpful to this court in deciding this case. Not only does its brief fail to comply with 9th Cir. R. 13(b) 1, 2, 3, and 4, but it fails to mention the facts of this case or even the names of the parties other than on the cover. We can only conclude that the government does not take very seriously the processes of this court."

Federal Rule of Civil Procedure 11 provides that the signature of an attorney certifies that "he has read the pleading, motion or other paper; that to the best of his knowledge...it is well grounded in fact and is warranted by existing law or a good faith argument...and that it is not interposed for any improper purpose...." It "not only authorizes but requires the court to impose a sanction upon a person or party that submits a pleading or motion in violation of that rule. It specifically addresses motions that are interposed for improper purposes 'such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.'" Smith v. Heckler, Civ. No. S-83-1609-EJG (E.D. Cal. May 1, 1985) "Order Re: Sanctions."

Federal courts have found it necessary to award Rule 11 fees against the Secretary and his attorneys in Social Security cases. In Smith, supra, the district court detailed the government's behavior and then held the "defendants' motion practice to be in violation of Rule 11. It is apparent that the flurry of motions were brought for the improper purpose of delaying compliance with the court's order of June 6, 1984 and November 27, 1984. Similarly, defendants' opposition to plaintiffs' motion to compel compliance was not well grounded or warranted by existing law but was interposed for delay." The court declined to penalize the local U.S. Attorney, finding that "the defendant agency's own general counsel and regional attorney have, in fact, been responsible for the dilatory methods employed in this case." (p.5.)

In Johnson v. Secretary, 581 F. Supp. 1117, 1119 (D. D.C. 1984), the court described the case has having a "Kafka-like quality to it." After once having been defaulted for failure to answer, SSA proceeded to fail to answer even after the court granted its motion to vacate the default. SSA filed a motion for an extension of time in which to answer. The district court held that it was "not powerless to act in the face of the contumacy of the defendant," Id. at 1120, and ruled that the Secretary had violated Rule 11. Id. at 1121. Like the Smith court, this court held that the Secretary's attorneys were at fault:

> "Nothing contained in this opinion is intended as an attack upon the Assistant United States Attorney assigned to this case. Her professionalism and high ethical standards are well known to this Court. The Court realizes that she, like all of the attorneys in the United States Attorney's office, must take her clients as she finds them. Rather, the egregious conduct of the defendant crystalized a recurring problem faced by attorneys in the United States Attorney's office. Specifically, government clients who fail to abide by the Federal Rules of Civil Procedure, fail to obey orders of United States court, and commit similar defalcations, all of which give rise to the unpleasant occasion when this Court must, in the interest of justice, use its powers to the full extent of the law...
>
> As far as this case is concerned, when one talks about the poor and disadvantaged, and the need for benefits under Social Security, the Court will not tolerate disobedience of its orders through admitted bureaucratic delay and lack of cooperation caused by attorneys responsible for a government agency. The conduct of the defendant shows a total lack of regard for human misery and suffering which must be brought to a stop. Poor and disadvantaged people cannot afford the luxury of bureaucratic delay and indifference to human needs." 587 F. Supp. at 1121-22.

In addition to Johnson, supra, numerous courts have been faced with the problem of SSA's failure to properly answer the complaints for judicial review filed by the disabled.[3] In some cases, after having sought and obtained numerous extensions of time in which to file the answer, SSA attorneys seek a remand because the plaintiff's file is lost or the tape of the hearings before the ALJ is either lost or inaudible. See, for example, LaBonne v. Heckler, 574 F. Supp. 1016 (D. Minn. 1983) [Motions for remand granted to permit SSA to find or reconstruct the records; interim benefits ordered for the plaintiffs]; Moser v. Heckler, 587 F. Supp. 158, 159-160 (D. S.D. 1984) [Plaintiff sought a default judgment against the Secretary four months after her time to answer (which had previously been extended) had expired. At that time "counsel for the Secretary (a U.S. Attorney) in good faith assured the Court and claimant that the transcript was forthcoming from the Department....Two days after this Court's order (denying plaintiff's motion for default) was filed the Secretary moved to remand because her counsel learned that claimant's agency file was indeed lost." The court granted the motion for remand but awarded interim benefits "to preserve the status quo of this needy claimant."]; Mills v. Heckler, 595 F. Supp. 952 (S.D. N.Y. 1984) [Extension of time granted by HHS must pay benefits until the answer is filed]; Simon v. Heckler, 585 F. Supp. 537 (S.D. Ohio 1984) [Remand granted to reconstruct file; HHS to pay benefits]; Larkin v. Heckler, 584 F. Supp. 512 (N.D. Cal. 1984) [HHS' motion for remand to obtain a consultative psychiatric evaluation denied where SSA had previously sought three extensions and the "record strongly suggests that the motion has been interposed to cause unnecessary delay." Pursuant to Fed. R. Civ. Proc. 11, HHS must pay attorney's fees incurred as a result of the motion]; Garrison v. Heckler, 580 F. Supp. 520 (W.D. Mo. 1984) [SSA sought a remand to construct the file. The court granted the motion but required SSA to complete reprocessing within 60 days]; Spencer v. Heckler, 579 F. Supp. 1451 (W.D. Mo. 1984) [Court granted SSA additional time in which to file transcript and noted that further delay could result in an order requiring payment of interim benefits]; Borowski v. Heckler, 581 F. Supp. 549 (N.D. Ind. 1984) [The Appeals Council had reversed a favorable ALJ decision. In court, SSA sought a remand claiming that the hearing tape was inaudible. The court questioned how, if the tape was inaudible, the Appeals Council could have reviewed the entire record before reversing and, while expressing displeasure with SSA, granted the remand]; Gomaz v. Heckler, 591 F. Supp. 1122 (E.D. Wis. 1984) [Interim benefits awarded as a result of SSA delay]; Marguccio v. Secretary, 586 F. Supp. 886 (W.D. N.Y. 1984) [Remand due to inaudible tape; interim benefits awarded]; Zink v. Heckler, Civ. Action No. 84-3467 (E.D. Pa. 1985) [Where SSA sought a remand for a new hearing because it had lost the file and tape, the court ordered SSA to hold the new hearing within 45 days and to issue a final decision "No later than ninety days from the date of the accompanying order." In addition, the Secretary was required to pay the plaintiff interim benefits "because of the delay in defendant's careless handling of the claims file and hearing tape...."].

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[3] Fed. R. Civ. Proc. 12(a) requires the Secretary to file an answer within 60 days after service. 42 U.S.C. §405(g) requires that, "As part of his answer the Secretary shall file a certified copy of the transcript of the records including the evidence upon which the findings and decisions complained of are based."

In addition, to ignoring federal procedural rules, the Secretary also fails to implement court orders in some Social Security cases. In one case in Virginia, the district court was so outraged by the Secretary's failure to respond to his orders that he appointed a special prosecutor and had criminal contempt proceedings initiated against Secretary Heckler. See United States of America v. Heckler, Criminal Action No. 84-00023-01-R (E.D. Va. 1984). (The court later dismissed the proceeding.) In New York, a district court held Secretary Heckler in civil contempt for failing to implement the court's order awarding disability benefits. See Delgado v. Heckler, 80 Civ. 4045 (VLB) (S.D. N.Y. 1984). See also, York v. Secretary, 582 F. Supp. 768, 769 (W.D. Mo. 1984) [The district court had awarded benefits to the plaintiff and had required SSA to report to the court on the amount of the back award owed to the plaintiff within 40 days. SSA did not make the calculation because the Justice Department told SSA it did not have to act until after the time to appeal had run. On the date that the 40 day period expired, SSA returned to the court for an extension. The court extended the time 15 days (not the 60 days which had been sought) and stated, "The Secretary is reminded that it is the order of this Court, not the order of the Justice Department, that required that the calculations be reported by March 5."]; Stringer v. Heckler, 585 F. Supp. 709, 710 (W.D. Ky. 1983); [184 days after the court issued its order remanding the case to the Secretary, SSA's General Counsel transmitted the order to the Office of Hearings and Appeals. It took this long "despite the conscientious and persistent efforts of claimant's counsel to expedite the reconsideration." In the face of this delay the court granted the claimant's motion for summary judgment, finding that she had previously met her burden of proof, and awarded benefits].

b) The courts have also focused, on substantive grounds, on the shoddy quality of SSA's decisions. As with the procedural issues, there have been numerous decisions reflecting judicial concern, to the point of outrage, over the quality of SSA's decisions. In Jones v. Heckler, 583 F. Supp. 1250, 1251-3 (N.D. Ill. 1984), the court noted "the extraordinary poverty of the Secretary's position - a distressingly recurrent phenomenon these past few months...." He further noted:

"Almost without exception, the cases of this type that have come ripe for decision during the immediate past have had two things in common:

1. An off-the-wall decision by an ALJ; and

2. poor lawyering by the government in an effort to support an insupportable administrative decision.

"Nor has this Court been the unlucky victim of change assignments. Any reading of the West's Federal Case News reflects the same kind of increased numbers of cases around the country, and the same kind of widespread rejection of what the Secretary is doing....

"No one, including this Court wants to see undeserving claimants receive benefits. But what appears to be happening is that benefits are being denied by the Secretary not on the merits in individual cases, but on a more restrictive policy that is result-oriented rather than justice-oriented...."

In Wier v. Heckler, 734 F.2d 955, 957 (3d Cir. 1984), in the context of SSA's failure to follow Third Circuit precedent, discussed supra, the Third Circuit discussed generally the problems it was seeing in Social Security cases:

"The problem is not so much the increase in filings and the consequent burden imposed on already-taxed federal judicial resources. Rather, what troubles us more is the fact that the Secretary so often appears to have wrongfully withheld benefits or to have processed a claim so that it is impossible to tell whether he correctly denied benefits."

See also McLean v. Heckler, Civ. Action No. 83-3429 (E.D. Pa. 1984) ["This case presents an appalling example of sheer bureaucratic dishonesty. The evidence shows overwhelmingly that the claimant is totally disabled and for the ALJ to hold otherwise is an indulgence in the most blatant hypocrisy. If the purpose of the United States Department of Health and Human Services is to crush defenseless human beings, as it seems to be, it would succeed unless in cases like this, courts interposed a protective arm."]; Merli v. Heckler, Civ. Action No. 83-189 (D. N.J. 1984) ["The Department of Health and Human Services has apparently determined to effect economies by systematically denying disability benefits to those who are entitled to them...."]; Ornelas v. Heckler, Civ. Action No. 81-K-2049 (D. Colo. 1984) [Ruling from the bench on September 19, 1984: "I think their conduct is unconscionable and it's despicable....The Appeals Council has no right in the face of the record that was made to make any finding on credibility, to make any finding on vocational capacity. It is dishonest, cynical and mendacious."].

Without attorney representation, it would be much more difficult for a person to present his/her case to a federal court. Obviously, it is preferable not to have to reach the court stage. However, just as in the administrative process, if one needs to seek review, representation is critical.

B. What Are The Problems For Attorneys In Securing Fees?

At this point, it has become almost foolhardy for a disabled person to attempt to negotiate his/her way through the appellate process unrepresented. Despite that fact, many disabled people continue to be unrepresented. At the same time that the rules have become more complex, so have the problems facing private attorneys in seeking reimbursement for their services. From my perspective, two factors contribute to the problems:

1) Because attorneys usually obtain their fee from the retroactive lump some award, legislation which effectively reduced the amount of the lump sum has affected their ability to be paid. There are two major sources of lump sum reductions:

a) When a person seeks continuation of benefits through the ALJ level in a termination case, there will be no back award if s/he prevails at the ALJ level.

b) Various laws permit SSA to reduce the amount of an SSI back award by the amount of any interim benefits paid by the state to the individual. This has affected not only SSI back awards but also Title II back awards. This is because in cases where concurrent applications were filed, SSA will frequently award the SSI benefits first, reimburse the state its interim relief, and then deduct the entire SSI amount from a Title II back award when the Title II award is later made. The result often will be a very small Title II back award. Similar problems exist with workers' compensation offsets in Title II.

2) Some types of issues rarely, if ever, involve any possibility of a lump sum. This is particularly true with overpayment issues, and less frequently raised issues such as the appropriateness of a particular representative payee, or the need of a disabled widow over age 60, who is already receiving retirement benefits, to establish eligibility as a disabled widow solely so she can obtain Medicare prior to age 65.

While the legal services programs represent thousands of people on Social Security and SSI issues annually, there is no way that these programs can possibly meet the entire demand. As a result, mechanisms are needed which will assure the private attorney that, upon successfully resolving a Social Security or SSI case, s/he will be able to secure his/her fee. This is the only way to assure that competent counsel is available and accessible to disabled individuals when they require assistance.

While the National Organization of Social Security Claimants' Representatives is presenting a more detailed, comprehensive proposal, which I support, it is useful to discuss briefly here the core features which are needed to address the attorneys fees problem:

a) In cases where various offsets against a back award will apply, SSA should be required to pay the attorney's fee before implementing any of the offsets. To the extent that this may cut into the reimbursement a state would otherwise receive, the difference will be more than adequately made up by the fact that the individual will no longer be dependent upon the state for income assistance.

b) In all other Title II and Title XVI cases, Congress should formally provide the claimant/beneficiary with a number of options, dependent upon successful resolution of the case:

i) If there is a back award, the fee will be taken from that sum.

ii) If there is no back award:

A) The individual can pay the attorney in installments over the period of representation. The funds will be placed in an escrow account, to be returned if the case is not won.

B) If the individual is unable to pay such installments, then at the time of the award, SSA will pay the attorney's fee and debit the individual's account. The amount owed would then be repaid by the individual by reducing his/her benefit by a small amount (no more than 10% of the monthly benefit) until the full amount has been withheld.

I offer this last option recognizing that past experience clearly reflects that without representation, many disabled appellants will not prevail upon appeal. In addition, in termination cases, the alternative would be to eliminate the right to such benefits pending appeal. This recently acquired right is simply too critical to the disabled to jeopardize.

SSA's recent move to limit the ALJs' authority to award fees to fees below $1,500 further exacerbates an already miserable situation. The timing is remarkable: just as SSA is about to issue probably tens of thousands of termination decisions, SSA has made it virtually impossible to secure competent private attorney representation.

While a comprehensive solution is needed to this problem, H.R. 2312, introduced by Representative Frank, presents a good interim solution to the problems. I urge the Subcommittee to move quickly to act on H.R. 2312, so as to assure that SSA has not effectively precluded disabled individuals from seeking competent counsel, experienced in Social Security laws and representation. I also support the package of proposals presented by NOSSCR here today as a reasonable, much-needed comprehensive solution to these issues.

Thank you for providing me with this opportunity to testify.

Chairman JACOBS. Thank you, Ms. Sweeney.

Ms. SWEENEY. Thank you.

Chairman JACOBS. Mr. Bechill.

STATEMENT OF WILLIAM D. BECHILL, EXECUTIVE VICE CHAIR, SAVE OUR SECURITY COALITION

Mr. BECHILL. Thank you, Mr. Chairman.

I am William D. Bechill, executive vice chair of the Save Our Security Coalition, former U.S. Commissioner on Aging.

The issues facing the subcommittee this morning are extremely important to disabled Americans who are applying for Social Security or supplementary security income benefits, or who seek to continue their eligibility.

The SOS Coalition wishes to stress the critical role which attorneys have come to serve in assuring that eligible disabled individuals are able to obtain and retain disability status.

The rules for establishing eligibility for disability benefits have, as you know, become increasingly complex. It has become very difficult, in many cases impossible for the disabled individual to understand what is required of her or him in order to prove their eligibility.

Without a legal advocate, many disabled individuals would be able to understand what evidence was needed in order to assure their record is fully developed so that an accurate decision can be made on their claim.

We are well aware of the very fine work done by Legal Service programs in representing the disabled. These programs are so seriously underfunded, however, that there is no way that they can meet the volume of requests for representation before SSA without substantially increasing their funding. And as a result, SOS is very concerned that SSA's procedures and the various statutory offsets not work to discourage members of the private bar from taking these cases.

Recent staffing and budget cuts at the Social Security Administration are affecting the disability insurance and supplementary security income disability programs. Recent information suggests that SSA does not even have the staff to mail notices which have already been typed and dated. Over 100,000 such notices apparently await mailing at the Social Security Administration according to a statement furnished by Wendy Hungerford of an AFGE local in Chicago.

Similarly, evidence is beginning to accumulate which suggests that SSA is no longer assisting many disabled persons in completing their applications or obtaining the medical evidence they will need to support their cases.

The recent action to limit the authority of ALJs to grant fees, reducing the authority from the amount of $3,000 to $1,500, we believe was taken precipitously without the benefit of public notice and comment. While we agree it is important to protect disabled individuals against the few unscrupulous attorneys who may exist, SSA's actions were ill advised and ill timed.

The net effect will not be to benefit disabled persons. Instead, it will seriously jeopardize their ability to ever secure competent representation. This in turn will mean that many individuals will not receive the benefits to which they are entitled under this program, or will find that the benefits they currently receive are illegally terminated.

We do not have particular proposals for addressing the various problems which attorneys face in securing payment of their fees in Social Security cases. I personally recognize it is a very complex matter.

We do believe, however, that it is critical that the subcommittee act soon to assure the continued availability of competent representation for disabled persons.

In addition, H.R. 2312, as introduced by Congressman Frank, which places a brief moratorium on SSA practices in this area, would greatly improve the current situation by maintaining the status quo of March 31, 1987, thereby permitting Congress time to view and assess the options available to it on this issue.

Thank you very much, Mr. Chairman.

[Attachments to the statement of Mr. Bechill follow:]

STATEMENT OF

Wendy Hungerford
Vice President

AFGE Local 1923, AFL-CIO

On March 25, 1987, I was asked by Myra Lara, Deputy Director of the Office of Disability Operations (ODO), to meet with Murrel Taylor, Director of the Division of Operational Services (DOS). The purpose of this meeting was for me to find out the duties necessary to perform the mail clerk position and determine if a severely handicapped employee, which I was representing, could do the job. Mail clerks are responsible for mailing out Beneficiary Notices. When I entered the DOS division office, Murrel Taylor, two other DOS managers, and a technical assistant were involved in a meeting. I offered to wait outside of the office, and I was told that that was not necessary. The meeting concerned workflow in DOS. I was informed that the meeting was to decide what to do with the 127,000 Beneficiary Notices that were sitting in DOS. The decision was made to offer overtime on Friday night, March 27, 1987, and Saturday, March 28, 1987. In addition, all personnel in DOS would be assigned to outgoing mail for 2 days, and detailees would be brought in from other areas in ODO. During the meeting, it was stated that the backlog of Notices had been brought to the attention of Joseph Muffolett, Director, ODO, Myra Lara, and Edward Podhajsky in December 1986. I asked Murrel Taylor how long the Notices were sitting in DOS. The reply was "we have had a massive backlog since November 1986." I asked what plans, if any, Joseph Muffolett had to correct the problem.

Murrel Taylor told me that ODO did not have the power nor the proper machinery to get the Notices out to the beneficiaries.

When the meeting concluded, I was escorted by the two managers and a technical assistant to observe the entire process of how Beneficiary Notices arrive in DOS: they are reviewed, enclosures are attached, they are folded, and they are put in envelopes and taken to the Machine Room to be mailed out.

The first location was 1-J-27 Dickinson Building. This location contained six large tubs overflowing with Notices that had to be screened and separated into categories. I asked the managers if that was a normal workflow because there were only two employees assigned to take care of the six tubs. The reply was, "You haven't seen anything yet. You think this is bad, wait until you see the next process." While I was standing there, two bargaining unit employees, who I have never met before, came up to me and asked me how long it would be before the Union would do something. They also asked when more people would be hired to help them. These employees were very upset. One employee stated to me, "Dorcas Hardy says the staffing cuts will not hurt our operation, but we don't have enough employees to get the letters to the beneficiaries. What do you think we are supposed to do?"

I was then escorted to the following locations, 1-E-27, 1-D-32, and 1-C-32 Dickinson Building, ODO. Upon entering these locations, I was shocked. Along the wall of 1-C-32 were tables with Outgoing Beneficiary Notices stacked about 5 feet high. The manager said, "Now you know why we need overtime." I asked if this was the 127,000 Beneficiary Notices that the Division Director, Murrel Taylor, was referring to, and the reply was, "That is some of the backlog." I asked approximately how many letters were on the tables, and the manager stated 150,000. I asked how they knew the amount, and the reply was, "Read the sheet on the top of one packet and add them all together."

Then I was escorted into the 1-C-32, and there was five rows of employees sitting at desks with stacks of Notices in front of them. I asked the manager how many stacks ONE employee can do in an 8-hour day, and the reply was, "It depends on the employee." I walked over to a stack of Beneficiary Notices and lifted up the top sheet. The date on this Beneficiary Notice was February 18, 1987.

I was then escorted to 1-C-25, which is the Machine Room. In this room (1-C-25) were stacks and stacks of computer letters waiting to be folded, put into envelopes, and sent through the machine. I asked the manager approximately how many letters there were, and the reply was, "I really don't know, the letters are lying around everywhere." I got ready to leave when two employees followed me out in the hallway. These employees stated, "You haven't seen it all yet." These two employees told me to walk into 1-J-21 on the first floor of the Dickinson Building. I told them that I would. I walked down to 1-J-32 (which is generally a training room). I saw large brown boxes of letters. There were also tubs of Notices ready to be sent to the beneficiaries. These letters all had to be screened, put into categories, enclosures associated with each letter folded, and put into envelopes. I returned to Myra Lars to discuss the handicapped employee I was representing. After our discussion over this employee, I asked Myra Lars what she had planned to do with the extreme backlog of Outgoing Beneficiary Notices. The reply was that she was aware of the problem but had no idea what to do except to HOPE for overtime.

I returned to the Union office and received a message to call Ed Pearson. I asked who Ed Pearson was, and I was told that he worked for the Government Accounting Office (GAO) and that he would be interested in the problem. I called Ed Pearson, and he agreed to come over to ODO and investigate the problem with the Notices.

On March 27, 1987, I called Ed Pearson to see if he did an investigation. Ed Pearson stated that he called ODO, but management could not meet with him. Ed Pearson stated he asked an ODO management official if they had 127,000 Beneficiary Notices UNMAILED, and he stated that management, "...did not deny the fact."

On April 1, 1987, an employee in DOS reported to me that there were four large brown boxes taken into 1-J-32 Dickinson Building that were stacked with Beneficiary Notices. I walked down to see if the report was correct and the door was locked.

Later, I walked down to 1-C-32 to see if the overtime hours granted for March 28, 1987, had reduced the backlog of Notices. There appeared to be a significant decrease. A manager called me and asked me what I wanted. I stated, "it looks like you really got a lot of work done Saturday on overtime." The manager replied, "Yes, we got all the Notices out of here." Then three employees started laughing, and one employee yelled out, "Yeah right. No, we didn't get the letters out. They (meaning management) are playing 'seek and find'." I asked the employee what he meant by that statement, and he replied, "You find the letters and management just moves them to another location or hides them." I then went to 1-C-25 Machine Room, and it appeared that the Notices were sent out. However, on the table were a stack of papers that read "Send to NCC" (National Computer Center) dated April 1, 1987.

On April 2, 1987, an employee called and told me that the majority of Outgoing Beneficiary Notices did not go out to the beneficiaries. ODO sent the letters to NCC (Room G-26 Mailroom) and also the Fourth Floor Distribution Center in the NCC.

On April 3, 1987, Gloria Fennoy, AFGE Vice President assigned to the NCC, called to tell me an ODO branch manager, Carolyn Boyd, was instructing NCC Mailroom employees on the procedure for mailing Beneficiary Notices.

On April 9, 1987, I called the NCC Union office to see if an officer would check and see if the letters went out to the beneficiaries. I was reported by an officer of AFGE Local 1923 that the Mailroom (G-26 NCC) had 12 hours overtime on April 4 and April 5, 1987. It appears only ONE tub of Beneficiary Notices remained to be done.

Later, the officer from NCC reported to me that the division director of the NCC Mailroom had a meeting with his employees. He told the employees that they would be doing Beneficiary Notices from the ODO operations on an ongoing basis and that there would be 8 hours overtime on April 11 and April 12, 1987, Sunday, to mail the ODO Beneficiary Notices.

On April 15, 1987, I walked down to locations 1-C-32 and 1-D-32 first floor Dickinson Building to see if the backlog had decreased or increased. I found that there were approximately 15,000 Beneficiary Notices still sitting.

On April 21, 1987, I walked down tc locations 1-C-32 and 1-D-32 and, apparently, the backlog was at a controllable size. However, I walked into the Machine Room (1-C-32 Dickinson Building), and I discovered 60 flat boxes containing approximately 200 Beneficiary Notices in envelopes (equals 12,000 Notices) waiting to be sent out to the beneficiaries. The date on the Notices were April 19, 1987. I walked back to 1-J-21, and there were several trays of

Beneficiary Notices dated April 18, 1987, April 19, 1987, and April 21, 1987. These trays were stacked in large push carts, in 3 stacks of 15 trays each, approximately 12 push carts.

An untimely letter has an enormous IMPACT on the beneficiary. A majority of Notices released from ODO contain timeframes. All these letters are already dated 5 days ahead when they leave the individual modular areas.

For example, a benefit authorizer requests the typist to type an Overpayment Notice which includes:

1. the amount of an overpayment to the beneficiary;
2. why the person is overpaid;
3. complete waiver rights;
4. the statement that "If you do not request a waiver or pay the amount within 30 days, we will
   a. withhold your benefits (Stop)
   b. reduce your benefits
5. reconsideration paragraph

If the letter was complete, the letter went out (meaning picked up to go to the Outgoing Mailroom). Then it is the Mailroom's responsibility to get that letter out timely.

I have been employed by SSA since May 19, 1971. For the last 10 years, I served the agency as an ODO Typing Technical Assistant (TA). During my tenure as a TA, one point has always been stressed--Notices must be dated and mailed out timely. A large portion of the Notices contain timeframes (waiver and reconsideration rights). The fact remains that ODO does not have enough manpower to get ODO (Disability Notices) out to the beneficiaries. By this backlog, the agency has created its own backlog in other areas because the dissatisfied beneficiaries are writing in and calling wondering why we have stopped their checks. They never received their explanation timely.

Wendy Hungerford
Wendy Hungerford
April 25, 1987

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
Chicago Regional Office

REGIONAL MEMORANDUM NO. 16-87 DI-7

TO : All District, Branch, Teleservice Center, and Satellite Office Managers

DATE: January 28, 1987

FROM : Office of the Regional Commissioner

Refer to: SDSB4

SUBJECT: PROGRAMS--Instructions on the Self-Help Completion of Disability Reports at Home and Claimant Involvement in Obtaining Medical Evidence of Record (MER)--ACTION

INTRODUCTION

One of Commissioner Hardy's objectives is to deliver the highest level of quality service to the public in the most timely and cost-effective manner. To that end we have developed two initiatives: Field Offices Requesting Medical Evidence of Record (FORMER) and increasing claimant participation in the interview process.

Under FORMER the MER is requested at the earliest possible time --immediately following the FO interview. Each state's Quality Circuits Steering Committee has submitted a FORMER proposal to the Regional Office. We are now reviewing those plans.

The second initiative (instructions attached) focuses on claimant completion of disability reports at home for teleclaims, appointments, and, on an optional basis, for walk-in interviews. This process minimizes the FO time in completing forms and permit claims representatives (CR's) to focus on supplementing claimant responses. Procedures are also included for claimants to obtain MER from their treating sources. These procedures should be implemented as soon as possible.

BACKGROUND

The Atlanta Region piloted claimant completion of disability reports at home and concluded:

- Claimants are able to provide a picture of themselves in their own words so that the DDS' have a better understanding of the condition and how it prevents them from working;
- About 20 minutes of interviewing time is saved resulting in an efficient and more pleasant interview; and
- Accuracy of the disability report is enhanced, not diminished, because there is active management review of the process.

Additionally, claimants are asked to obtain MER from their treating sources at the same time, permitting them to take a more active role in the processing of their disability claims.

MANAGEMENT RESPONSIBILITIES

The success of these initiatives depends on careful management attention. Ongoing supervisory reviews of the disability reports are necessary to ensure an accurate and timely disability product. Reviews of interviewing practices are also necessary to ensure the interviewer exercises correct judgement.

I know I can count on your commitment to these initiatives. I will appreciate your feedback regarding these new procedures and any recommendations you have to improve the process.

Any questions or comments concerning this memorandum or the attachment should be directed to Ilene Kirtzic of the Disability Programs Branch at commercial (~~312~~)-886-3418 or FTS 886-3418.

Marlene M Moleski

Marlene M. Moleski
Regional Commissioner

Attachment

REGIONAL TRANSMITTAL NO.

Audience: CR, DRT, FR,
OA, OS, RR,
DDS--REF
Chicago Region

Originating Office: P-DPB

PROGRAM OPERATIONS MANUAL SYSTEM
Part 04 - Disability Insurance
Chapter 110 - Initial Claims Processing

New Material	No. of Pages
DI R11005.020..........	3

ACTION NOTE

Cross-refer DI 11005.020 to DI R11005.020

Background

Field offices (FO's) are responsible for ensuring that the SSA-3368-F8, SSA-3820-F6, SSA-3441-F6 and SSA-3369-F6 Disability Reports contain complete and accurate information. These forms were designed for self-help and most claimants and/or their representatives usually have little or no difficulty in completing them.

Explanation of Manual Supplement

This supplement expands self-help procedures to allow claimants and/or their representatives to complete these forms at home in disability teleclaims, appointment situations, and on an optional basis for walk-in interviews.

U.S. DHHS
Social Security Administration
Chicago Regional Office

Effective Date: Upon Receipt

R11005.020 Self-Help: Completion of Disability Reports at Home

A. Background

The FO's are responsible for ensuring that the SSA-3368-F8, SSA-3820-F6, SSA-3441-F6, and SSA-3369-F6 Disability Reports contain complete and accurate information. These forms were designed for self-help and most claimants and/or their representatives usually have little or no difficulty completing them.

Self-help has been used successfully in most FO reception areas and provides several advantages:

- Valuable interview time is saved resulting in increased efficiency;
- Claimants can use their own words to present a better picture of their disability so that adjudicators better understand their condition and how it prevents them from working; and
- Part of the self-help procedure provides claimants the opportunity to secure medical evidence of record from their treating sources and to submit it with the disability reports.

B. The New Self-Help and Medical Evidence Procedure

The new self-help procedure allows claimants to complete the disability reports at home in disability teleclaims, appointment situations, and for walk-in interviews on an optional basis. This procedure applies to both initial and reconsideration claims.

These new guidelines do not replace regular claims taking policies. Claims should always be taken if the claimant wishes to file or there is apparent eligibility.

This procedure permits claimants to access medical, employment, and other records and should result in a better disability product and improved public service.

1. Walk-In Interviews (OPTIONAL)

The interviewer must carefully:

- Assess the claimant's ability to complete the form at home. If it is doubtful, see "Exceptions."
- After ensuring that the claimant meets all the nondisability entitlement factors, complete all nondisability forms, obtain signed medical releases, record complete observations and provide reporting instructions.

- Complete the claimant's name, SSN, and telephone number on the form. Show a unit designation for mail association.
- Have the claimant complete the signature block on the report to avoid unsigned forms.

  Explain the self-help procedure and give the claimant the form to take home for completion and include a prepaid postage return envelope with a unit designation. Stress the importance of thorough and timely completion of the form. Explain that the claim cannot be processed until the report is received.

  Request that the claimant submit any medical evidence he/she has obtained from a medical source. An SSA-12 (GN 00202.125C.) should be used as a guide, and highlight the items the claimant should obtain and submit. If the claimant will be seeing his/her attending physician within 5 calendary days of the interview, he/she should be asked to, if possible, obtain and submit medical reports along with the disability forms.
- Emphasize the timely return of the form and followup by telephone if it is not received within the predetermined timeframes established by each office, e.g. 5 days.
- Use the tally for control purposes.
- Carefully review the form upon receipt.
- Telephone the claimant to obtain missing or incomplete information or to clarify any discrepancies. Use a Report of Contact to document any changes (DI 11005.050).

2. Teleclaims Interviews

   - Except for having the claimant sign the Disability Report at the interview, all the steps in DI R11005.020 B.1. (above) should be followed.
   - The forms will be mailed to the claimant for completion.
   - The signature blocks should be highlighted and the claimant must be advised to sign all forms after completion.
   - Record pertinent observations about difficulty in speaking, coherency, hearing, understanding, and answering (DI 11005.045).
   - Tightly control teleclaims via the tally or other FO device.

3. Appointments

   - The items in DI R11005.020 B.1. (above) also apply where appropriate.

- When the appointment is scheduled, the disability report should be mailed to the claimant for completion whenever possible and brought to the FO at the time of the scheduled appointment. The person scheduling the appointment should use the SSA-12 as a guide in advising the claimant what documents to bring to the interview. This includes requesting the claimant to submit medical reports in his/her possession. If the claimant will be seeing his/her treating source before the scheduled appointment, ask them to obtain a medical report from that source and bring it to the interview. If there is sufficient time, the standard teleclaims forms should be mailed to the claimant for completion prior to the interview. The SSA-12 should be enclosed with these forms as a guide.

- The interviewer must carefully review all forms and record observations during the interview.

C. **Exceptions**

The following exceptions apply:

- Any claimants alleging a mental impairment such as schizophrenia, paranoia, mental retardation, anxiety, nervousness, etc., are excluded from this procedure, unless they are accompanied by a representative. These claimants usually need assistance in completing forms and obtaining evidence.

- The interviewer should always complete the form if the claimant requests it, or expresses concern or indicates apprehension about his/her ability to complete the form.

- The interviewer should also assist in any other situation such as dire need or homelessness where it is possible the form will not be properly completed or returned timely.

D. **Conclusion**

Both management and staff attention are essential to ensure the success of this procedure. Ongoing supervisory review and good claims representative (CR) judgement are necessary to ensure a complete and accurate product.

Use of these procedures should make more productive use of CR time and in many cases improve the information going to the DDS'.

Quality Circuits can be used to resolve any problems that may occur.

Social Security Administration

DISABILITY REPORT

PLEASE PRINT, TYPE, OR WRITE CLEARLY AND ANSWER ALL ITEMS TO THE BEST OF YOUR ABILITY. If you are filing on behalf of someone else, enter his or her name and social security number in the space provided and answer all questions. COMPLETE ANSWERS WILL AID IN PROCESSING THE CLAIM.

PRIVACY ACT NOTICE: The information requested on this form is authorized by Title 20 CFR 404.1512 and Title 20 CFR 416.912. The information provided will be used in making a decision on your claim. While completion of this form is voluntary, failure to provide all or part of the requested information could prevent an accurate or timely decision on your claim and could result in the loss of some benefits. Information you furnish on this form may be disclosed by the Social Security Administration to another person or governmental agency only with respect to social security programs and to comply with Federal laws requiring the exchange of information between Social Security and another agency.

A NAME OF CLAIMANT	B SOCIAL SECURITY NUMBER ___ ___ ___ / ___ ___ / ___ ___ ___ ___	C TELEPHONE NUMBER where you can be reached (include area code)

D WHAT IS YOUR DISABLING CONDITION? *(Briefly explain the injury or illness that stops you from working.)*

PART I — INFORMATION ABOUT YOUR CONDITION

1 When did your condition first bother you	MONTH	DAY	YEAR

2A Did you work after the date shown in item 1? *(If "no," go on to items 3A and 3B.)*	☐ YES ☐ NO
2B If you did work since the date in item 1, did your condition cause you to change —	
Your job or job duties?	☐ YES ☐ NO
Your hours of work?	☐ YES ☐ NO
Your attendance?	☐ YES ☐ NO
Anything else about your work?	☐ YES ☐ NO

(If you answered "no" to all of these, go to items 3A and 3B.)

2C If you answered "yes" to any item in 2B, explain below what the changes in your work circumstances were, the dates they occurred, and how your condition made these changes necessary.

3A When did your condition finally make you stop working?	**MONTH**	**DAY**	**YEAR**

3B Explain how your condition now keeps you from working.

Form SSA-1368-F8 (7-85) Use prior editions until supply is exhausted 1

PART II — INFORMATION ABOUT YOUR MEDICAL RECORDS

4. List the name, address and telephone number of the doctor who has the latest medical records about your disabling condition.

If you have no doctor check ☐

NAME

ADDRESS

TELEPHONE NUMBER (include area code)

HOW OFTEN DO YOU SEE THIS DOCTOR?

DATE YOU FIRST SAW THIS DOCTOR

DATE YOU LAST SAW THIS DOCTOR

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment)*

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

5A. Have you seen any other doctors since your disabling condition began? *If "yes," show the following*

☐ YES ☐ NO

NAME

ADDRESS

TELEPHONE NUMBER (include area code)

HOW OFTEN DO YOU SEE THIS DOCTOR?

DATE YOU FIRST SAW THIS DOCTOR

DATE YOU LAST SAW THIS DOCTOR

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment)*

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

5B. Identify below any other doctor you have seen since your illness or injury began.

NAME

ADDRESS

TELEPHONE NUMBER (include area code)

HOW OFTEN DO YOU SEE THIS DOCTOR?

DATE YOU FIRST SAW THIS DOCTOR

DATE YOU LAST SAW THIS DOCTOR

REASONS FOR VISITS *(show illness or injury for which you had an examination or treatment.)*

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

e following:

CLINIC

ADDRESS

ayed at least overnight?)

(If "yes", show.)

WERE YOU AN OUTPATIENT?
☐ YES ☐ NO (If "yes", show.)

ONS	DATES OF DISCHARGES	DATES OF VISITS

ALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

ATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness known. If no treatment or medicines, show "NONE".)

If you have been in other hospital or clinic for your illness or injury, identify it below

AME OF HOSPITAL OR CLINIC

ADDRESS

ATIENT OR CLINIC NUMBER

RE YOU AN INPATIENT? (stayed at least overnight?)
☐ YES ☐ NO (If "yes", show.)

WERE YOU AN OUTPATIENT?
☐ YES ☐ NO (If "yes", show.)

DATES OF ADMISSIONS	DATES OF DISCHARGES	DATES OF VISITS

REASON FOR HOSPITALIZATION OR CLINIC VISITS (show illness or injury for which you had an examination or treatment.)

TYPE OF TREATMENT OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

If you have been in other hospitals or clinics for your illness or injury, list the names, addresses, patient or clinic numbers, dates and reasons for hospitalization or clinic visits in Part VI.

7. Have you been seen by other agencies for your disabling condition?
(VA, Workmen's Compensation, Vocational Rehabilitation, Welfare, etc.)
(If "yes," show the following:) ☐ YES ☐ NO

NAME OF AGENCY

ADDRESS

YOUR CLAIM NUMBER

DATE OF VISITS

TYPE OF TREATMENT, EXAMINATION OR MEDICINES RECEIVED (such as surgery, chemotherapy, radiation, and the medicines you take for your illness or injury, if known. If no treatment or medicines, show "NONE".)

If more space is needed, list the other agencies, their addresses, your claim numbers, dates, and treatment received in Part VI.

8. Have you had any of the following tests in the last year?

TEST	CHECK APPROPRIATE BLOCK OR BLOCKS	IF "YES" SHOW	
		WHERE DONE	WHEN DONE
Electrocardiogram	☐ YES ☐ NO		
Chest X-Ray	☐ YES ☐ NO		
Other X-Ray (name body part here)	☐ YES ☐ NO		
Breathing Tests	☐ YES ☐ NO		
Blood Tests	☐ YES ☐ NO		
Other (Specify)	☐ YES ☐ NO		

9. If you have a medicaid card, what is your number (some hospitals and clinics file your records by your medicaid number.)

PART III — INFORMATION ABOUT YOUR ACTIVITIES

10. Has your doctor told you to cut back or limit your activities in any way? ☐ YES ☐ NO
If "yes", give the name of the doctor below and tell what he or she told you about cutting back or limiting your activities

11. Describe your daily activities in the following areas and state what and how much you do of each and how often you do it

- **Household maintenance** (including cooking, cleaning, shopping, and odd jobs around the house as well as any other similar activities)

- **Recreational activities and hobbies** (hunting, fishing, bowling, hiking, musical instruments, etc.):

- **Social contacts** (visits with friends, relatives, neighbors):

- **Other** (drive car, motorcycle, ride bus, etc.)

PART IV — INFORMATION ABOUT YOUR EDUCATION

12 What is the highest grade of school that you completed and when?

13 Have you gone to trade or vocational school or had any type of special training? If "yes," show: ☐ YES ☐ NO

- The type of trade or vocational school or training
- Approximate dates you attended
- How this schooling or training was used in any work you did.

PART V — INFORMATION ABOUT THE WORK YOU DID

14 List all jobs you have had in the last 15 years before you stopped working, beginning with your usual job. Normally, this will be the kind of work you did the longest. (If you have a 6th grade education or less, AND did only heavy unskilled labor for 35 years or more, list all of the jobs you have had since you began to work. If you need more space, use Part VI.)

JOB TITLE (Be sure to begin with your usual job)	TYPE OF BUSINESS	DATES WORKED (Month and Year)		DAYS PER WEEK	RATE OF PAY (Per hour, day, week, month or year)
		FROM	TO		

15A Provide the following information for your usual job shown in item 14, line 1.

In your job did you
- Use machines, tools, or equipment of any kind? ☐ Yes ☐ No
- Use technical knowledge or skills? ☐ Yes ☐ No
- Do any writing, complete reports, or perform similar duties? ☐ Yes ☐ No
- Have supervisory responsibilities? ☐ Yes ☐ No

15B Describe your basic duties (explain what you did and how you did it) below. Also, explain all "Yes" answers by giving a FULL DESCRIPTION of: the types of machines, tools, or equipment you used and the exact operation you performed; the technical knowledge or skills involved; the type of writing you did, and the nature of any reports; and the number of people you supervised and the extent of your supervision.

15C. Describe the kind and amount of physical activity this job involved during typical day in terms of:

- **Walking** (circle the number of hours a day spent walking) — 0 1 2 3 4 5 6 7 8
- **Standing** (circle the number of hours a day spent standing) — 0 1 2 3 4 5 6 7 8
- **Sitting** (circle the number of hours a day spent sitting) — 0 1 2 3 4 5 6 7 8
- **Bending** (circle how often a day you had to bend) — Never · Occasionally · Frequently · Constantly
- **Reaching** (circle how often a day you had to reach) — Never · Occasionally · Frequently · Constantly
- **Lifting and Carrying**: Describe below what was lifted, and how far it was carried. Check heaviest weight lifted and weight frequently lifted and/or carried.

HEAVIEST WEIGHT LIFTED	WEIGHT FREQUENTLY LIFTED/CARRIED
☐ 10 lbs ☐ 20 lbs ☐ 50 lbs ☐ 100 lbs ☐ Over 100 lbs	☐ Up to 10 lbs ☐ Up to 25 lbs ☐ Up to 50 lbs ☐ Over 50 lbs

PART VI — REMARKS

Use this section for additional space to answer any previous questions. Also use this space to give any additional information that you think will be helpful in making a decision in your disability claim. (such as information about other illnesses or injuries not shown in Parts I and II.) Please refer to the previous items by number.

Knowing that anyone making a false statement or representation of a material fact for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

NAME (Signature of claimant or person filing on the claimant's behalf)

SIGN HERE ▶

DATE

Witnesses are required ONLY if this statement has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person making the statement must sign below, giving their full addresses.

1. Signature of Witness	2. Signature of Witness
Address (Number and street, city, state, and ZIP code)	Address (Number and street, city, state, and ZIP code)

PART VII — FOR SSA USE ONLY - DO NOT WRITE BELOW THIS LINE

NAME OF CLAIMANT	SOCIAL SECURITY NUMBER __ __ __/__ __/__ __ __ __

16 Check any of the following categories which apply to this case:

PRESUMPTIVE DISABILITY CONSIDERATION
(If any of these boxes are checked, DO's (and DDS's) should be alert to the possibility of a presumptive disability determination in SSI claims per DI 00404.210 and DI 00401.435.

A ☐ Amputation of two limbs

B ☐ Amputation of a leg at the hip

C ☐ Allegation of total deafness

D ☐ Allegation of total blindness

E ☐ Allegation of bed confinement or immobility without a wheelchair, walker, or crutches, allegedly due to a longstanding condition — exclude recent accident and recent surgery

F ☐ Allegation of a stroke (cerebral vascular accident) more than 3 months in the past and continued marked difficulty in walking or using a hand or arm

G ☐ Allegation of cerebral palsy, muscular dystrophy or muscular atrophy and marked difficulty in walking (e.g., use of braces), speaking or coordination of the hands or arms

H ☐ Allegation of diabetes with amputation of a foot

I ☐ Allegation of Down's Syndrome (Mongolism)

J ☐ An applicant filing on behalf of another individual alleges severe mental deficiency for claimant who is at least 7 years of age. The applicant alleges that the individual attends (or attended) a special school, or special classes in school, because of his mental deficiency, or is unable to attend any type of school (or if beyond school age was unable to attend), and requires care and supervision of routine daily activities.

K. ☐ Allegation of renal disease requiring dialysis on a regularly scheduled basis.

L. ☐ Allegation of Acquired Immune Deficiency Syndrome (AIDS)

17A. Does the claimant speak English? .... ☐ Yes ☐ No
If "no," what language does he speak?

17B. Does the claimant need assistance in prosecuting his or her claim? .... ☐ Yes ☐ No
If "yes," show name, address, relationship, and telephone number of an interested party willing to assist the claimant.

NAME	ADDRESS	RELATIONSHIP	TELEPHONE NUMBER (area code)

17C. Can the claimant (or his representative) be readily reached by telephone with no communication problems due to language, speech or hearing difficulties? *If "no", DO should complete SSA-3369-F6* ☐ Yes ☐ No

18A. Check each item to indicate if any difficulty was observed.

Reading	☐ Yes	☐ No	Using Hands	☐ Yes	☐ No
Writing	☐ Yes	☐ No	Breathing	☐ Yes	☐ No
Answering	☐ Yes	☐ No	Seeing	☐ Yes	☐ No
Hearing	☐ Yes	☐ No	Walking	☐ Yes	☐ No
Sitting	☐ Yes	☐ No			
Understanding	☐ Yes	☐ No	Other (Specify):		

18B If any of the above items were checked "yes," describe the exact difficulty involved:

18C Describe the claimant fully (e.g., general build, height, weight, behavior, any difficulties that add to or supplement those noted above, etc.)

19 Medical Development — Initiated by District or Branch Office

SOURCE	DATE REQUESTED	DATE(S) OF FOLLOW-UP	CAPABILITY DEVELOPMENT REQUESTED

20. DO or BO curtailed completion of Parts III - V per DI 00403.105 (DI 00401.065) ☐ YES ☐ NO

21 Is capability development by the DDS necessary? ☐ YES ☐ NO
If "yes", show "DDS capability development needed" in item 11 of the SSA-831-U5

22. Is development of work activity necessary? .... ☐ YES ☐ NO
If "yes", is an SSA-820-F4 or SSA-821-F4 .... ☐ Pending ☐ In File

23. SSA-3368-F8 taken by:
☐ Personal Interview ☐ Telephone ☐ Mail

24. Form supplemented: ☐ Yes ☐ No
If "yes" by:
☐ Personal Interview ☐ Telephone ☐ Mail

SIGNATURE OF DO OR BO INTERVIEWER OR REVIEWER	TITLE	DATE

Form SSA-3368-F8 (7-85)

*U.S. GOVERNMENT PRINTING OFFICE: 1986-491-372/40003

Chairman **Jacobs**. Mr. Archer.

Mr. **Archer**. In the opinion of the panel, and I thank each of you for your presentations to the committee, should the Congress continue to require a withholding of 25 percent of past due benefits and require attorneys to petition the SSA for their fees? I think that should continue.

Ms. **Sweeney**. Yes, I think it should.

The 25-percent withholding doesn't cover all the cases though. There are quite a few where there needs to be some other mechanism to assure attorneys get paid.

There are a lot of offsets right now against back awards. For example, workers' comp offsets, SSI, and in many cases the State will pay interim assistance to an individual with the understanding that the SSI program will reimburse them.

If a person has an SSI and title II application pending, SSA will pay on the SSI one first. They can pay the State the interim assistance, and then offset all of that against the title II back award, which means there is nothing there for the attorney. So it would be very helpful if the 25 percent withholding could be strengthened to assure that the attorney's fee were taken before any workers' comp offset or any State interim benefits were paid.

But there also needs to be some mechanism for assuring that attorneys can get paid, for example, in overpayment cases. There are cases where an individual, a disabled widow, for example, who is over the age of 60, and is already on benefits as a retired person, does not need disabled widow's benefits because her amount wouldn't change. But she does need to establish disabled widow status in order to receive Medicare before she is 65.

There is no money that comes out of that, and there needs to be some mechanism for assuring that attorneys can get paid in those cases as well. That may be something like having the Secretary pay the fee, and then withhold a small amount from the person's benefit for some period of time, at the rate of 5 or 10 percent of the benefit. It is not my favorite way of doing things.

When I first heard suggestions like that 5 or 6 years ago, I thought they were totally outrageous. But the bottom line is, if you are not represented, your chances of winning are so bad, you are better off with a little withholding of the benefit than you would be with nothing.

Mr. **Archer**. Either of you have any comments to make?

Do you think Congress should endorse the concept of a contingent fee?

Ms. **Sweeney**. Yes.

Ms. **Determan**. The American Bar Association, as you are well aware, is in favor of contingency fees in the appropriate circumstances. And I am glad for an opportunity to comment on some of the prior figures and notes about contingency fees.

As I think you are aware, a contingency fee is an arrangement in a given case. It is not designed to cover losses you take in other cases. It is designed to compensate the attorney for the risks in the given case. And the suggestions that somehow or another, a particular disability claimant is paying for all the ones that the lawyers took and lost and, therefore, didn't get compensated for, is to me a distortion of the basic philosophy behind the contingency fee.

I am not prepared to say that this never happens. Perhaps it does. But a contingency fee is an arrangement with a particular client that takes into account the risks in representing that particular client.

Ms. Sweeney. I think you could also design a contingency fee system that had built-in abuse sensors. You don't pay somebody $700 an hour in a Social Security case. There has got to be a limit on the outside. And there has to be some way where a person has—where it is clear that there is abuse, that the Secretary can step in and say no, that just isn't acceptable.

But otherwise I think the contingency fee system has worked pretty well in this area.

Mr. Archer. Do the other two of you endorse Ms. Sweeney's suggestion that where there are retroactive benefits, that there be a withholding, as I understood your recommendation, that would pay the attorney out of future benefits?

Ms. Determan. There needs to be some system to pay the attorney if we are going to have people represented. And, very frankly, I personally can't come up with a better one than Ms. Sweeney has suggested. The American Bar Association itself as an institution has no position on that question.

Mr. Archer. Mr. Bechill, do you have any?

Mr. Bechill. Well, SOS has no formal position on this. I would, however, respect Ms. Sweeney's point of view. I think you do need a system, and I think what she enunciated is a fair principle to follow.

Mr. Archer. Thank you.

Ms. Sweeney. Could I add one thing, and that is that there is another whole area where the back award gets cut back, and that is very important with the amendment in 1984 which allows people to have their benefits continued through the ALJ stage. That substantially reduces the amount of the back award. And yet it is critical that people have access to that money during that period. So there really needs to be that other mechanism in place.

Mr. Archer. Thank you. Thank you, Mr. Chairman.

Chairman Jacobs. Mr. Moody.

Mr. Moody. Thank you.

Do you think there is an abuse out there that the administration proposal is attempting to address? Do you ever come across instances of excess charging by attorneys, and do you have a system of monitoring that? Does the profession itself monitor or guard against an occasional unscrupulous or overcharging attorney?

Any of you want to answer?

Ms. Determan. Certainly I would not suggest that the system in place in the various ethical enforcement provisions is enough to take care of all of the lawyers who can be abusive in the fee area, both in Social Security claims and in other areas.

I would not pretend that that doesn't happen. And I agree with Ms. Sweeney that some kind of oversight to take care of the most serious problems needs to be in place.

However, to suggest that the problem is so extensive as to seriously jeopardize the numbers of lawyers who are willing to get into the system at all, thereby denying people representation to which they are entitled, seems to me to let a relatively modest problem overwhelm and sweep up the entire system, thereby creating a much more serious problem.

But, sure, there are greedy lawyers.

Mr. **Moody**. Do you folks know of any system for peer review of that occasional greedy lawyer or any kind of monitoring system?

Ms. **Sweeney**. I think the Secretary is in the best position to do that.

Mr. **Moody**. I'm sorry?

Ms. **Sweeney**. I think the Secretary is in the best position to do that.

Mr. **Moody**. To set up a system?

Ms. **Sweeney**. Yes. And actually they technically have a system. Right now if you ask for a fee that is over—well, prior to April 1st, if you asked for a fee over $3,000, that automatically triggered review by the regional ALJs. So all those fees that were over that level that they may be claiming were abusive and were actually approved by their regional ALJ. Now it is even worse. The problem is that you are going to get many cases above the $1,500 level. Every ALJ is going to have to write many special reports.

They have essentially taken a sledgehammer to a very tiny problem allegedly in order to resolve the problem.

The Inspector General's report in fact suggested abuses are very small. If you added the number of cases under $100 together per hour, it came to over 80 percent of the cases. And as a practical matter, $75 which, Mr. Jacobs, you pointed out, isn't even the figure that is used in the EAJA, is the fee the Government pays, not that an individual pays. This is not the Government's money once it has been awarded to the individuals.

The EAJA fee, in many parts of this country, is already $90 because of cost-of-living adjustments to the $75 fee. So, when you put that in there, even the Inspector General's report suggests that the vast majority of people are not abusing the system. There clearly are people who are greedy. I think SSA has the power to take care of that right now.

Mr. **Moody**. Well, what was the reason they claimed that the administrative law judges were too busy to exercise efficient effective oversight here? Is that part of the argument too?

Ms. **Sweeney**. Previously if it was under $3,000, I think there was a sense that they are pretty much automatically granted. If it's over $3,000 that was impossible. And now if it is over $1,500, it's impossible.

I don't think there is any question that the ALJ is under a lot of pressure to move cases quickly. And at the same time, I don't think they get any awards for what they do on attorney's fee decisions.

And so there is a real sense that you want to get them out of there as quickly as possible.

That also though suggests that now there is no way the fees are going get above the $1,500 level because, for the very same reasons, the ALJ does not have the time to write the report to the regional ALJ to——

Mr. **Moody**. Ask for more?

Ms. **Sweeney**. To get more. So, essentially, for exactly the same reason that most fees previously were below $3,000, now they are going to be below $1,500. And I think the attorneys understand that is the way the system works. And they can't afford to operate in a system like that.

Mr. MOODY. By the way, back to the decision about whether or not to get into the profession, you said a few moments ago that contingency fees were only designed to cover that particular case and, yet, if an attorney doesn't have contingency fees that cover the broad averages, including the ones he loses and gets nothing for, then the contingency fee isn't going to be adequate to get someone to be in the profession.

So, I think inherently the contingency fee has to take the law of averages into account, doesn't it?

Ms. DETERMAN. When the system works ideally, and I can't pretend to know how often that is, the expectation in a contingent fee arrangement is that you are being compensated for the risk in that case. And if you don't take cases except at higher contingency fees, the risk is greater.

But, yes, of course, there is some general overhead factor built into my hourly rate, as there is with anyone who is practicing exclusively on contingency fees.

But it seems to me that the very oversight we are talking about if a contingency fee is so disproportionate to the risks in that particular case would be a reason for turning down the claim for the extra compensation.

If, on the other hand, an oversight system could be put into place where the risks in the particular case could be adequately taken into account, sometimes compensation over and above what we would all believe to be a market rate might be appropriate, because that particular case was won, notwithstanding that it may have been a very difficult and complex case. And other lawyers may very well have taken a look at it and said, "I am not willing to represent you, the risk of losing is just too great."

Mr. MOODY. So when the risk of losing is greater, the appropriate response is to raise the percentage of the contingency fee or raise the hourly rate to offset the probability problem.

Ms. DETERMAN. Well, there are some percentages that I think any of us would find just egregiously high. I think what happens in many of those cases is the lawyers just won't take them because the risk of loss is too great, and the risk of not getting paid at all is too great.

You have to understand that it is the rare claimant who has resources other than the very claim at issue. You can have a deal with a client at $200 an hour if you want to, but you are not going to get paid if the case is lost. And if you look at the case, you know that it is extremely unlikely to win on the facts. They can offer you any hourly rate they want to. You still are not going to take the case because you are not going to get paid.

Mr. MOODY. But you would say the chance of winning was one in three, yet it would be incorrect to take a 66 percent contingency fee.

Ms. DETERMAN. Well, I am not prepared to say what is and what is not. Again the ABA doesn't have a position. I, Sara Determan, would find a 66⅔ percent contingency fee outrageous.

Mr. MOODY. Even if the chance of winning were only one in three?

Ms. **Determan**. Even if the chance of winning were only one in three.

Mr. **Moody**. I had no questions for the administration, Mr. Chairman, because I wasn't here today when the administration witnesses were here. And I am sorry. I had to be at another meeting.

I just hope the committee can write a letter to HHS to clarify this issue about those claims in the pipeline. I hope the committee can make it clear with a letter to Ms. Hardy that we would hope those claims that are in the pipeline, and are caught between the $1,500 and the $3,000 cap would be treated properly.

Chairman **Jacobs**. I might say, Mr. Moody, I knew that was a concern to you, and propounded that question. And I believe the answer was that the pipeline claims are not subject to this new review.

Mr. **Moody**. Okay. Thank you.

Chairman **Jacobs**. Does somebody want to say for the record what the status is of the law with regard to penalties for lawyers who charge beyond what the Government allows in these claimant cases?

Ms. **Sweeney**. I don't know if there are criminal penalties which was questioned earlier. The SSA has, as of a year ago, started a system of keeping track of attorneys they think are abusive. It's not just for fees though, it's for malpractice type misrepresentation in cases.

Chairman **Jacobs**. Ms. Determan, do you know the status of the law on that?

Ms. **Determan**. I do not.

Chairman **Jacobs**. I think you will find that it is a criminal act, but I am not certain.

We will have another panel up here. We'll try it on each panel and see. We might even go back and crack the books before this day is over, I don't know. [Laughter.]

Thank you very much for your contribution.

Our next panel, Nancy Shor representing the National Organization of Social Security Claimants; the Chicago Bar Association represented by Mr. DeBofsky; and the Legal Services of Southern Piedmont, Inc., Mr. Sasser.

You know the 5-minute rule and all that. So please proceed in any order which you please.

STATEMENT OF NANCY G. SHOR, EXECUTIVE DIRECTOR, NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES

Ms. **Shor**. Thank you.

Mr. Chairman and members of the subcommittee——

Chairman **Jacobs**. Would any member of the panel care to state what I am looking at right now, what is the status of the law?

Is it a crime for a Social Security disability claimant's lawyer to charge privately that claimant any amount in excess of what the ALJ approves?

Ms. **Shor**. Absolutely.

Mr. **DeBofsky**. Yes.

Ms. **Shor**. Absolutely. There are no criminal penalties.

Chairman JACOBS. It is a misdemeanor?

Ms. SHOR. Yes.

Chairman JACOBS. And the limit of the penalty is a $500 fine?

Mr. DEBOFSKY. I believe that's correct. I believe that's correct.

There is also a provision for suspension of the attorney from practice.

Chairman JACOBS. Well, I think you all are to be commended for not having firsthand knowledge of it. [Laughter.]

Proceed.

Ms. SHOR. Mr. Chairman and members of the subcommittee, on behalf of the National Organization of Social Security Claimants' Representatives, I thank you for this opportunity to present our views.

I am executive director of NOSSCR, the most unwieldy name we hope you will encounter today. We are a national nonprofit association of approximately 2,400 claimants' representatives composed of attorneys and paralegals from both the private bar and from legal services programs.

Members of NOSSCR represent Social Security disability and SSI claimants at all levels of the process, from the initial level up through the U.S. Supreme Court.

We are keenly interested in the issue before this subcommittee today.

By way of background, I want to point out that currently at the administrative hearing level, 60 percent of claimants are represented nationwide. Whether or not claimants caught up in the appeals process will continue to have access to representation depends in large measure on the actions of this subcommittee and this Congress. Certain new attorneys' fee policies recently set in place by Social Security's Office of Hearings and Appeals seriously challenge the continuing ability and willingness of many private lawyers across the country to undertake representation of those claimants who see their counsel.

The value of representation has been highlighted in earlier testimony, but it is obvious good representation assures claimants of complete development and presentation of their claims, and a fair opportunity to obtain their benefits, despite increasingly complicated and complex rules and regulations for eligibility.

This right to representation, however, is hollow if claimants are unable to find lawyers to take their cases. One valuable source of representation is legal services programs who represent eligible claimants very competently and at no charge. Another important source is the private bar. Private attorneys may charge fees in Social Security and SSI cases in a fee structure probably more complicated now than any other area of legal practice. Clearly, only if the fees for representing claimants are fair will attorneys be willing and able to take these cases. Should fees be computed unfairly or paid with inordinate delay, attorneys will drop this part of their practice. The end result will be the claimants are unable to find counsel to assist them in their struggles to win benefits.

Under the current system, the act requires that the Secretary determine the amount of a representative's fee in every Social Security and SSI case. The act also requires the agency to withhold 25 percent of each retroactive award in title II cases to be used toward the payment of the authorized fee. The statutory plan is for the agency to regulate how much the claimant will pay. Please note the agency is forwarding that payment out of the claimant's own funds. The purpose of this system is twofold, to encourage and maintain a pool of competent counsel while, at the same time, protecting the interests of the beneficiaries.

At the present time, claimants have several important opportunities to participate in the fee setting process.

First, most enter into fee contracts with their attorneys. In fact, most State bars will require attorneys to enter into written agreements. Those contracts will specify the amount of the fee which the attorney plans to seek.

Second, the attorney is required to send a copy of the fee petition to the client before it is submitted, before the fee is set. And again once the fee has been set, the administration will send a copy to the claimant and advise him or her of his right to protest the amount that has been set.

In this regard, I think it is of note that Commissioner Hardy, in a response to the Office of the Inspector General's report, stated in a memo "While the fees currently approved do vary, claimants do not appear to be dissatisfied with the fees which are being approved, nor do attorneys, although attorneys do have complaints about the delays attendant with the process and about arbitrary fee reductions."

The fee system, as I have outlined it, is both complicated and time consuming for all parties concerned. The situation, however, has seriously worsened since your hearing on this issue in March of 1986. Recent changes effective March 31, 1987, by the Office of Hearings and Appeals, will exacerbate these problems, particularly as the continuing disability reviews are just getting underway.

The authority to set fees of the ALJs has now been restricted. The ceiling has been reduced from $3,000, which it has been since 1978, to $1,500. If an ALJ determines that a larger fee is warranted, instead of authorizing it, he or she must now write a recommendation to that effect, and jurisdiction is removed to the office of the regional chief.

At that regional chief's office, the fee will be set by a nonattorney adjudicator who was not present at the hearing, did not observe the attorney's contributions to the case, did not render a favorable decision for the claimant, and who often has incomplete access to the entire record.

We estimate from Social Security statistics that approximately 40 percent of fee petitions will now be going to the regional chief's office instead of remaining at the ALJ as was under the earlier system.

I would also point out that delays at the regional chief's offices have historically run about 6 months. There has been no additional staff put in to process this newer quote, and that is the one of the reasons that attorneys feel that delays are guaranteed.

A March 31, 1987, memo is currently being applied to all fee petitions which were in the pipeline on that date with no prior notice to anyone. We believe also that a distinct message has been delivered indirectly to the ALJs, the fees should not be set at a rate exceeding $75 an hour. We have seen several fee authorizations signed by ALJs since March 31, 1987, which state that the ALJ cannot approve a fee greater than $75 an hour.

This rate is discussed in the March 31 memo, which draws it from the Inspector General's report. It is presumably based on the hourly rate set by Congress in 1981 in enacting the Equal Access to Justice Act. The EAJA rate is not an appropriate parallel even when one considers that the EAJA rate the courts apply hovers around $90 an hour, reflecting the cost-of-living adjustment since 1981, as provided in the Equal Access to Justice Act itself. It is not applicable because it represents Congress' determination as to the rate taxpayers should reimburse citizens harmed by Government conduct which fails a substantial justification case. It does not presume to represent a reasonable fee.

In fact, the Equal Access to Justice Act is applied in Social Security cases which go into Federal court. Often the Federal judge allocates a dual award. He says there will be a certain amount paid at the rate of $75 an hour. In addition, there will be a certain amount paid from the claimant's past due benefits so as to arrive at a reasonable figure.

The Equal Access to Justice Act itself provides that where $75 an hour produces an inadequate fee, a Federal judge can authorize an additional fee to be paid by the claimant.

Whether or not this is the result which was intended, the net effect of the new fee policy will be to dramatically reduce the pool of competent counsel available to claimants seeking representation. This is because of the uncertainties and the delays that the new policy guarantees. Unless the new policy is rescinded, disability claimants seeking to establish entitlement to benefits, as well as in the near future terminated beneficiaries seeking reinstatement to the rolls, will be unable to retain counsel.

These claimants will find SSA's explanation that the fee restrictions are in their own best interests, to be somewhat disingenuous. Claimants who want to be represented are entitled to have the right to counsel preserved.

We urge your careful consideration of H.R. 2312, the moratorium bill proposed by the Honorable Barney Frank. This bill calls for a study of the current fee system to determine how well it is or isn't working, and how it could be improved. Surely such a comprehensive review with input from a variety of sources should be undertaken before changes with broad policy implications are implemented.

I would point out that in the work that has gone into the new proposed regulations which Associate Commissioner Bradley indicated would be coming out by the end of the summer, as far as I know, there has been no input from anyone other than staff at the Office of Hearings and Appeals.

We would propose for your consideration——

Chairman JACOBS. Ms. Shor, time passes quickly when you are enjoying yourself. We are a little over on your time.

Ms. SHOR. Okay. I will make the conclusion very short.

We do propose today a comprehensive reform package which we believe will effectuate the intent of Congress and, in fact, will effectuate the three goals that Commissioner Bradley enunciated earlier in her testimony.

I will just focus on two. We believe that, in the interest of efficiency for the system, streamlining the system, and producing a fair fee which will guarantee access to representation, that there should be rebuttable presumption that a fee will be 25 percent of the past due benefits unless the claimant or attorney objects, or unless a certain event is triggered. And examples of a trigger would be an ALJ's finding that an attorney's conduct was patently unreasonable, or if the retroactive amount exceeded a certain dollar amount, for example $4,000.

Another issue that we feel very strongly about as far as fees is in the area of where there are no past due benefits. NOSSCR is on record as supporting the legislation passed to allow terminated beneficiaries to request interim benefits. We supported that because of its importance to claimants, although obviously we realize that this was going to eliminate any pool from which a fee could be paid. And we would propose in those cases where there are no past due benefits, that fees be set by the ALJ in accordance with the regulatory factors; that that fee be paid by the Social Security Administration and created as an overpayment on that claimant's account.

I thank you very much for your attention today.

[The statement of Ms. Shor follows:]

TESTIMONY OF NANCY G. SHOR, EXECUTIVE DIRECTOR

NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS´ REPRESENTATIVES

Mr. Chairman and Members of the Subcommittee, on behalf of the National Organization of Social Security Claimants´ Representatives, I thank you for this opportunity to present our views. NOSSCR is a national non-profit association of 2,400 claimants´ representatives from both the private bar and from legal services programs. Since 1979, NOSSCR has presented fifteen national seminars on Social Security law and has published a monthly newsletter for the purpose of promoting high quality representation for Social Security and Supplemental Security Income claimants. Members of NOSSCR represent these claimants at all levels of the process, from the initial level to the United States Supreme Court. We are keenly interested in the issue before the Subcommittee today.

Currently, at the Administrative hearing level, 60% of claimants are represented. Whether or not claimants caught up in the appeals process will continue to have access to representation depends, in large measure, on the actions of this Subcommittee and this Congress. Certain new attorneys´ fee policies recently set in place by SSA´s Office of Hearings and Appeals seriously challenge the continuing ability of many private lawyers across the country to undertake representation of those claimants who seek their counsel.

The value of representation to individual claimants is obvious: good representation assures them a complete development and presentation of their claims and a fair opportunity to obtain their benefits, despite increasingly complicated and complex rules and regulations for eligibility.

Advocates have brought abuses of the termination process and inequitable evaluation of mental impairment cases, to mention but two examples, to the attention of Congress and the federal courts. Congress reacted when it realized the scope of the problems, and the Disability Amendments of 1984 passed almost unanimously. This vital legislation might well have been delayed, or might never have passed at all, had advocates not brought these issues outside the administrative process.

The right to representation is hollow, however, if claimants are unable to find counsel willing to take their cases. One valuable source of representation is legal services programs, who represent eligible claimants very competently and at no charge. Another important source is the private bar. Private attorneys may charge fees in Social Security and SSI cases in a fee structure probably more complicated than any other area of legal practice. Clearly, only if the fees for representing claimants are fair will attorneys be willing and able to take these cases. Should fees be computed unfairly or paid with inordinate delay, attorneys will drop this part of their practices. The end result will be that claimants are unable to find counsel to assist them in their struggles to win their benefits. Only if the right to counsel can be translated into obtaining counsel is it meaningful.

The Social Security Act requires that the Secretary determine the amount of a representative's fee in each Social Security case. The Act also requires the agency to withhold 25% of each retroactive award to be used towards payment of the authorized fee. The statutory plan is for the agency to regulate how much the claimant will pay the attorney; the agency forwards the authorized fee out of the claimant's funds. The purpose of this system is two-fold: to encourage and maintain a pool of competent counsel while protecting the interests of the beneficiaries. **Dawson v. Finch**, 425 F.2d 1192 (5th Cir. 1970).

The Secretary requires that attorneys submit detailed fee petitions on each case. For those cases in which claimants have prevailed at the hearing level, the fee petitions are reviewed and fees authorized by the Administrative Law Judge who heard the case. Since 1979, the "ceiling" for ALJs' authority has been set at $3,000. Until a recent change was announced, when the ALJ determined that a fee in excess of $3,000 was warranted, the ALJ wrote a memorandum to the Regional Chief ALJ, who ultimately set the fee. According to SSA's statistics, there were a total of 1,036 fees authorized by the ten Regional Chief ALJs during 1986 (an average of about 100 each).

Claimants have several opportunities to participate in the fee-setting process. First, most enter into written contracts with their attorneys, and these contracts specify the amount of the fee for which the attorney will seek approval. Second, the attorney must send a copy of the fee petition to the client, who has an opportunity to comment before the fee is set. Once the fee is set, the claimant has the right to object, and to appeal the amount. Of interest is the statement by SSA Commissioner Dorcas Hardy in a September 25, 1986 memorandum to the HHS Inspector General; "While the fees currently approved do vary, claimants do not appear to be dissatisfied with the fees which are being approved, nor do attorneys, although attorneys do have complaints about the delay attendant with the process and about 'arbitrary' fee reductions."

The fee system is both complicated and time-consuming for all concerned. Recent changes announced on March 31, 1987 by the Office of Hearings and Appeals will exacerbate these problems.

The authority of ALJs to set fees has now been restricted. As stated in the March 31, 1987 memorandum, the "ceiling" for ALJ authorization of fees has been reduced to $1,500. If an ALJ determines that a larger fee is warranted, (s)he must write a recommendation to that effect, and jurisdiction is removed to the office of the Regional Chief ALJ. At that Regional office, the fee will be set (under the Regional Chief's direction) by a non-attorney adjudicator who was not present at the hearing, who did not observe the attorney's contributions to the case, who did not render the favorable decision for the claimant, and who rarely has access to the entire record. From the statistics provided by SSA, the average attorney's fee for 1986 for a case won at the administrative level was $1,340.00. Clearly, a $1,500.00 reduction in the ALJ's authority (from $3,000 to $1,500) will shift a very large number of fee petitions from the Offices of Hearings and Appeals to the Regional Chief ALJs' staffs.

In addition, we believe that a district message has been delivered, indirectly, to the ALJs that fees should not be set at a rate exceeding $75/hour. I have already seen several fee authorizations signed by ALJs which state that they cannot approve more than $75/hour. This hourly rate is discussed in the March 31, 1987 memo, which draws it from the discussion in the report of the Inspector General. It is presumably based on the hourly rate set by Congress in 1981 in enacting the Equal Access to Justice Act. The EAJA rate is not an appropriate parallel, even when one considers that the EAJA rate the courts apply hovers around $90/hour, reflecting cost of living adjustments since 1981. It is not applicable because it represents Congress' determination as to the rate taxpayers should reimburse citizens harmed by government conduct which fails a "substantial justification" test. It does not presume to represent a "reasonable fee."

Whether or not this is the result which was intended, the net effect of this fee policy will be to dramatically reduce the pool of competent counsel available to claimants seeking representation. This is because of the uncertainties and the delays that the new policy guarantees. Unless this new policy is rescinded, disability claimants seeking to establish entitlement to benefits, as well as terminated beneficiaries seeking reinstatement to the rolls, may be unable to retain counsel. These claimants will find SSA's explanation that the fee restrictions are in the best interests of the claimants to be disingenuous. Claimants who want to be represented are entitled to have their right to counsel preserved.

We urge your careful consideration of H.R. 2312, the "moratorium" proposed by the Honorable Barney Frank. This bill calls for a study of the current fee system to determine how well it is or isn't working, and how it could be improved. Surely such a comprehensive review with input from a variety of sources should be undertaken before changes with broad policy implications are implemented. One study of a relatively small number of fee petitions by the Office of the Inspector General provides information which is incomplete, and, in some respects, inaccurate and misleading should not be the basis for an administrative action which is producing the decision by many attorneys to stop representing Social Security claimants.

We would propose a comprehensive reform package which we believe will effectuate the intent of Congress that claimants should be able to choose to have competent and effective representation in what, for many, will be the most important legal case in their lives.

First, where there is a favorable result producing retroactive benefits, the attorney's fee should be twenty-five percent of the total family retroactive amount, unless either the claimant or the attorney objects, or unless a case review is activated by a certain specified event, such as a fee in excess of $4,000 or a finding by an ALJ that an attorney's conduct was "patently unreasonable." In these latter instances, the fee will be determined by the Secretary with the following factors to be considered: (1) the extent and type of services the representative performed; (2) the complexity of the case; (3) the level of skill and competence required of the representative in giving the services; (4) the amount of time the representative spent on the case;

(5) the results the representative achieved; (6) the level of review to which the claim was taken and the level of review at which the representative was retained; (7) the amount of the fee requested; (8) the contingency of the representation; and (9) any written fee agreement between the representative and the attorney. There would be no limit on the amount of the fee which an Administrative Law Judge could award.

Second, where there is a favorable result which does not produce any past-due benefits (for example, continuing disability review cases where the beneficiary has elected to receive interim benefits pending ALJ review), fee petitions would be required. Fees would be set in accordance with the nine factors set out above. Once set, the fee would be paid in full by SSA to the attorney. SSA can recoup this amount out of the individual's future benefits, at a rate not exceeding 10% of each month's benefit. This would not be subject to a request for waiver. This is not a completely novel concept, as SSA presently will create just such an overpayment on an individual's account when the past-due benefits have been incorrectly released to the individual when they should have been withheld for payment of the authorized attorney's fee.

Third, where the claimant's benefits are subject to an offset due to receipt of worker's compensation benefits, the 25% for the attorney's fee should be computed and paid before the offset is applied. SSA's current policy is to offset first, and then calculate the withheld amount as 25% of the "net" past-due. The net effect is to discourage attorneys from accepting these cases, because the likelihood of an adequate fee is so small. Calculating and paying the attorney's fee before applying the offset would resolve this problem, without in any way detracting from the purpose of the offset, which is to encourage workers to return to work where possible by limiting their combined worker's compensation and Social Security benefits to less than their previous earned income.

Fourth, the fee provisions for determination of amount as well as payment from withheld benefits should be parallel in the SSI program to the provisions we have outlined for the Title II program. The same policy purpose is achieved by direct payment in SSI cases as is achieved in Title II cases. In those instances involving concurrent eligibility under both programs, the fee should be set as 25% of the past-due Title II benefits, before the SSI offset is applied. The amount of that fee shall be fully credited against any obligation that the individual may have incurred in reimbursing a state disability program or AFDC from his or her retroactive SSI award.

Fifth, the twenty-five percent withheld amount should not be used to repay any outstanding overpayments which may exist on the claimant's account.

Finally, certain changes should be made in the system which Congress has given to the federal judiciary for setting fees in court cases. The ceiling of 25% of past-due benefits should be eliminated, so as to achieve uniformity with the administrative fee process. Federal judges shall set reasonable fees in accordance with the nine factors outlined above. The statute should be amended to include a fee system for SSI parallel to that for Title II cases.

I appreciate the Subcommittee's concern for these issues as well as the opportunity to present our views today.

Chairman JACOBS. You should thank us. You took twice your time.

Mr. DeBofsky.

STATEMENT OF MARK D. DeBOFSKY, ESQ., CHICAGO, IL, MEMBER OF SOCIAL SECURITY LAW COMMITTEE, CHICAGO BAR ASSOCIATION

Mr. DEBOFSKY. I would like to begin by thanking Representative Andy Jacobs and his staff for inviting me to testify at the hearing today.

My name is Mark DeBofsky. I am an attorney in private practice in Chicago, Ill. I have traveled here today at my own expense as a delegate of the Social Security Law Committee of the Chicago Bar Association. While most of the views that I will be expressing here today are views that have been discussed and unanimously adopted by that committee as well as the Chicago Bar Association itself, some of my comments are my own and not those of any other person or organization.

I am here because my practice is concentrated in representing claimants seeking disability benefits from the Social Security Administration. I have only been actively involved in this field for the past 5 years. But, based upon the satisfaction that I derive from representing the disabled, it is my hope that I will be able to continue accepting these cases for the rest of my career. This is because no aspect of legal practice has been as rewarding to me as the gratitude expressed by those clients whom I have helped to obtain disability benefits.

We are all aware of the recent report of the Inspector General of the Department of Health and Human Services. That report has recommended a limitation of attorneys' fees to the equivalent of $75 per hour with a cap of $1,500 on an administrative law judge's discretion to set fees.

The first response I wish to make to that report is that I am outraged at its implication that attorneys who practice in this field are dishonest or otherwise overreach their clients when making fee requests. I am insulted by this attack on my profession and upon my peers and colleagues. We all accept disability cases on a contingent fee basis substantially below the one-third or 40 percent rate charged by personal injury lawyers. We are also prohibited by law from charging a retainer, or receiving any compensation until long after the conclusion of the case.

Moreover, as a matter of course, we all accept cases that we know we may lose. But we represent the clients nonetheless because of our pro bono obligation to the community. I challenge the other members of the practicing bar to demonstrate as strong a public interest commitment as the attorneys who represent disability claimants.

The men and women who are willing to represent the disabled are among the most dedicated, selfless and hard working people I know. The Inspector General's report, I believe, is an unjustified smear on our integrity.

Furthermore, I am certain that the Inspector General has never dealt with the realities of conducting a law practice or the actualities of representing the disabled. The expenses of conducting a law practice are increasing annually. The $1,500 fee limitation that has been implemented, along with the $75 per hour proposed hourly fee limitation, does not provide sufficient compensation to encourage high quality, experienced representatives to continue as attorneys for the disabled. Instead, it will have precisely the opposite effect. No one will be willing to practice as Social Security claimants' representatives if the potential fees are restricted in the manner proposed in the Inspector General's report.

As a result, the group most deserving of representation, according to Judge Gerald Heaney of the U.S. Court of Appeals for the Eighth Circuit, will be denied access to counsel who unquestionably are effective advocates on behalf of the disabled.

The Congress and the Social Security Administration should applaud attorneys for their willingness to represent disability clients on a contingent fee basis and await payment until after the end of the litigation.

It should also be kept in mind that while in personal injury suits, cases may be settled soon after, or even in some cases, before filing, and payment received within a short period of time, there is no opportunity for settlement with disability claims, and payment is delayed for administrative reasons until at least 150 days after an award favoring the claimant.

Further, the attorneys must often contend with other delays in payment. In Chicago, one of our administrative law judges routinely waits at least 1 year before he will issue a fee award. And often the award is zero dollars, necessitating a further appeal to the regional chief administrative law judge, and even further delay.

Another consideration not addressed in the Inspector General's report is the risk of contingent fee litigation. Unfortunately, we do not win all of our cases. If we did, an assurance of payment of $75 per hour for our work on disability cases, regardless of outcome, would approach prevailing standards of compensation, though the Federal courts in Chicago have ruled in EAJA cases that $90 per hour more appropriately reflects the cost of living in that city. In some cases, however, we achieve spectacular results. We may, through our zealous advocacy, reopen earlier adverse determinations and allow our clients to recover quite substantial past-due benefits. Should we not be rewarded for such exemplary service?

The Supreme Court has held in a recent case, entitled *Blum* v. *Stenson*, that contingent fee litigation is the only means of attracting lawyers to handle cases so that their income would be competitive with their colleagues who get paid, win or lose. The system as it existed prior to March 31, 1987, allowed leeway for the contingent nature of this litigation and enabled an attorney to be rewarded for exemplary service. Contingent fees, which based on the figures I have seen, translated to an average of between $50 to $100 per hour are well below the $350 per hour reportedly charged by the large Wall Street and LaSalle Street law firms.

Considering that statistics show that represented claimants lose approximately 40 percent of their' disability cases, the suggested compensation rate of $75 per hour in successful cases is reduced even further. When, in addition, workers' compensation and supplemental security income offsets from past-due benefits, are made prior to the certification of a fee, the resulting hourly rate is reduced even further. Difficulties in collecting fees from clients in SSI cases is another consideration reducing the remunerative value of these cases. Thus, it should be clear that the conclusions of the Inspector General are devoid of association with the realities of practice.

In addition, the proposed——

Chairman JACOBS. Mr. DeBofsky, you are way over your time.

Mr. DEBOFSKY. Okay. What I would like to do is just move to my suggestions.

First, I would urge that the statute and regulations be amended to allow attorneys to receive a presumptive fee of 25 percent of past-due benefits up to a ceiling of $4,000 unless the client objects, the attorney requests an individual fee setting, or the amount requested is in excess of $4,000.

I would also propose that the presumptive fee may be disturbed if the administrative law judge objects.

We agree with the ALJs who we have heard from in Chicago who feel that they have the right to impose fee restrictions as a means of preventing a windfall to the attorney who does his client more harm than good, but wins nonetheless.

Further, I suggest that the Social Security Administration stop spending administrative time and money in maintaining a withholding system. When a past-due benefit check is issued, both in title II and title XVI cases, it should be made payable jointly to the attorney and the client. The 25-percent figure for presumptive attorneys' fees should continue to be specified in award certificates. As with personal injury settlements, the attorney shall be responsible for collecting only the fee and reimbursement for costs.

This system is used effectively to speed the processing of insurance settlements, and if implemented in disability cases, it would hasten payment of attorneys' fees. Currently, due to the delay, the attorneys are not paid in a timely fashion, and this proposal would eliminate that delay.

I wish to thank all of you for your consideration of these comments. I also appreciate your willingness to allow me to address you, and I thank you for your attention to the issue of attorneys' fees in Social Security disability cases.

[The statement of Mr. DeBofsky follows:]

STATEMENT OF MARK D. DEBOFSKY
Attorney at Law

I would like to begin by thanking Representative Andy Jacobs and his staff for inviting me to testify at the hearing today. I am an attorney in private practice in Chicago, Illinois. I have traveled here today at my own expense as a delegate of the Social Security Law Committee of the Chicago Bar Association, and although most of the views I express here today are views that have been discussed and unanimously adopted by that committee as well as the Chicago Bar Association itself, my comments are my own and not those of any other person or organization.

I am here because my practice is concentrated in representing claimants seeking disability benefits from the Social Security Administration. I have only been actively involved in this field for the past five years, but based upon the satisfaction that I derive from representing the disabled, it is my hope that I will be able to continue accepting these cases for the rest of my career. This is because no aspect of legal practice has been as rewarding to me as the gratitude expressed by those clients whom I have helped to obtain disability benefits.

We are all aware of the recent report of the Inspector General of the Department of Health and Human Services. That report has recommended a limitation of attorneys fees to the equivalent of $75.00 per hour with a cap of $1,500.00 on an administrative law judge's discretion to set fees. The first response I wish to make to that report is that I am outraged at its implication that attorneys who practice in this field are dishonest or otherwise overreach their clients when making fee requests. The Chicago Tribune entitled an article on the Inspector General's report, "Laxity Lets Lawyers Soak Pensioners." As a member of the bar of the State of Illinois, as well as the bar of the Supreme Court of the United States, I have taken an oath to uphold the law and Constitution and have obligated myself to conform my practice to the American Bar Association's Code of Professional Responsibility. I am insulted by this attack on my profession and upon my peers and colleagues. We all accept disability cases on a contingent fee basis substantially below the 1/3 or 40% rate charged by personal injury lawyers. We are also prohibited by law from charging a retainer or receiving any compensation until long after the conclusion of the case. Moreover, as a matter of course, we accept cases that we know we will likely lose, but we represent the clients anyway because of our pro bono obligation to the community. I challenge the other members of the practicing bar to demonstrate as strong a public interest commitment as the attorneys who represent disability claimants. The men and women who are willing to represent the disabled are among the most dedicated, selfless, and hardworking people I know. The Inspector General's report is an unjustified smear on our integrity.

Furthermore, I am certain that the Inspector General has never dealt with the realities of conducting a law practice or the actualities of representing the disabled. The expenses of maintaining a law practice are increasing annually. Labor costs for clerical assistance are constantly rising. There is also a necessity for lawyers to maintain computer and telecommunications equipment. Office rent and overhead has reached $65.00 a square foot in some areas of the country according to a recent Wall Street Journal story; and the insurance crisis has hit the attorneys as well, producing five-fold increases in malpractice insurance premiums.

The fifteen hundred dollar fee limitation that has been implemented along with the $75.00 per hour proposed hourly fee limitation does not provide sufficient compensation to encourage high-quality, experienced representatives to continue as attorneys for the disabled. Instead, it will have precisely the opposite effect. No one will be willing to practice as Social Security claimants' representatives if the potential fees are restricted in the manner proposed in the Inspector General's report. As a result, the group most deserving of representation, according to Judge Gerald Heaney of the United States Court of Appeals for the Eighth Circuit, will be denied access to counsel who unquestionably are effective advocates on behalf of the disabled. The Congress and the Social Security Administration should applaud attorneys for their willingness to represent disability clients on a contingent fee basis and await payment until after the end of the litigation. It should also be kept in mind that while in personal injury suits, cases may be settled soon after or even in some cases before filing, and payment received within a short period of time, there is no opportunity for settlement of a disability claim and payment is delayed for administrative reasons until at least one hundred and fifty days after an award favoring the claimant. Further, the attorneys must often contend with other delays in payment. In Chicago, one of our Administrative Law Judges routinely waits at least one year before he will issue a fee award; and often the award is zero dollars, necessitating a further appeal to the Regional Chief Administrative Law Judge and even further delay.

Another consideration not addressed in the Inspector General's report is the risk of contingent fee litigation. Unfortunately, we do not win all of our cases. If we did, an assurance of payment of $75.00 per hour for our work on disability cases, regardless of outcome, would approach prevailing standards of compensation, though the federal courts in Chicago have ruled that $90.00 per hour more appropriately reflects the cost of living in that city. In some cases, however, we achieve spectacular results. We may, through our zealous advocacy, reopen earlier adverse determinations and allow our clients to recover quite substantial past-due benefits. Should we not be rewarded for such exemplary service? The Supreme Court has held in a recent case entitled Blum v. Stenson, 104 S.Ct. 1541 (1984), that contingent fee litigation is the only means of attracting lawyers to handle cases so that their income would be competitive with their colleagues who get paid, win or lose. The system as it existed prior to the Inspector General's report allowed leeway for the contingent nature of this litigation and enabled an attorney to be rewarded for exemplary service. Contingent fees, which based on the figures I have seen, translated to an average of between $100.00-$150.00 per hour under the earlier system, are well below the $350.00 per hour reportedly charged by the large Wall Street and LaSalle Street law firms. Considering that statistics show that represented claimants lose approximately forty percent of their disability cases, the compensation rate of $75.00 per hour in successful cases suggested by the Inspector General's report is reduced even further. When, in addition, workers' compensation and supplemental security income offsets from past-due benefits are made prior to the certification of a fee, the resulting hourly rate is reduced even further. Difficulties in collecting fees from clients in SSI cases is another consideration reducing the remunerative value of these cases. Thus, it should be clear that the conclusions of the Inspector General are devoid of association with the realities of practice.

In addition, the proposed limitation is contrary to regulations promulgated by the Social Security Administration. While §206 of the Social Security Act provides for a fee equivalent to 25% of past-due benefits, the regulations suggest that in evaluating a request for approval of a fee, the following factors be considered:

1. The extent and type of services the representative performed;

2. The complexity of the case;

3. The level of skill and competence required of the representative in giving the services;

4. The amount of time the representative spent on the case;

5. The results the representative achieved;

6. The level of review to which the claim was taken and the level of review at which the representative became your representative;

7. The amount of fee the representative requests for his or her services, including any amount authorized or requested before, but not including the amount of any expenses he or she incurred.

No limitation is contained in the statute or regulation as to the amount of the fees payable to the attorneys. Instead, the statute and regulations are designed to encourage attorneys to handle these matters on a contingent fee basis because that is the only way by which an indigent claimant can afford to retain counsel. Implementation of the restriction proposed by the Inspector General's report will effectively eliminate contingent fee representation, and hence destroy the incentive for attorneys to handle such cases. As a result, it will not be the attorneys who suffer, but the unrepresented claimants who will be unable to effectively present their claims to the administrative law judges and the courts.

In conclusion, I would like to offer some suggestions. First, I would urge that the statute and regulations be amended to allow attorneys to receive a presumptive fee of twenty-five percent of past-due benefits up to a ceiling of $4,000.00. This proposal is consistent with the position taken by National Organization of Social Security Claimants' Representatives. NOSSCR would allow the 25% to be paid unless the client objects, the attorney requests an individual fee setting, or the amount requested is in excess of $4,000.00. I would also propose that the presumptive fee may be disturbed if the administrative law judge objects. Many of us who practice disability law in Chicago have met with the administrative law judges in our region and have listened to their concerns. We agree with the ALJs that they should have the right to impose fee restrictions as a means of preventing a windfall to the attorney who does his client more harm than good but wins nonetheless.

Further, I suggest that the Social Security Administration stop spending administrative time and money in maintaining a withholding system. When a past-due benefit check is issued, both in Title II and in Title XVI cases, it should be made payable jointly to the attorney and the client. The 25% figure for presumptive attorneys fees should continue to be specified in Award Certificates. As with personal injury settlements, the attorney shall be responsible for collecting only the fee and reimbursement for costs. A settlement statement should be prepared and signed by the attorney and client reflecting all receipts and disbursements. This system is used effectively to speed the processing of insurance settlements, and if implemented in disability cases, it would hasten payment of attorneys' fees. Currently, attorneys await payment of fees until at least 120 days after their clients have received their past-due benefit checks. This proposal would eliminate that delay.

I wish to thank all of you for your consideration of these comments. I also appreciate your willingness to allow me to address you and I thank you for your attention to the issue of attorneys fees in Social Security disability cases.

Chairman **Jacobs**. Mr. Sasser.

Technically there is no time left for this panel, but go ahead.

STATEMENT OF MAC SASSER, MANAGING ATTORNEY, LEGAL SERVICES OF SOUTHERN PIEDMONT, INC.

Mr. **Sasser**. Thank you very much, Mr. Chairman. I will try to keep my remarks brief.

My name is Mac Sasser. I am a managing attorney for Legal Services of Southern Piedmont, in Concord, NC.

I would like to thank the subcommittee for its invitation to present my views on the recent policy developments at the Social Security Administration on attorneys' fees.

I believe that these developments and the tendency they portend will, if unchecked, cause grave consequences for millions of disabled citizens of this country.

For 5½ years, I have worked as a legal services attorney. I have never practiced in the private bar. I have represented scores of individual disability claimants, and have served as counsel in *Hyatt* v. *Heckler*, a class action against SSA based on its nonacquiescence to the case law of the Fourth Circuit.

Through my role in *Hyatt* over the last 3 years, I have had the opportunity to work with hundreds of private attorneys throughout North Carolina who handle disability cases on a routine or on an occasional basis.

In *Hyatt*, the plaintiff class demonstrated that SSA deliberately ignored controlling precedent in deciding the cases of claimants and beneficiaries. Consequently, the Federal courts have held that the plaintiffs in *Hyatt* are entitled to new reviews of their claims under proper lawful standards. SSA estimates that over 90,000 North Carolinians may be entitled to this relief. And *Hyatt* is only one of a number of similar lawsuits won by plaintiffs across the country.

It is with this experience that I offer these remarks on the Secretary's current policy and recent proposals on attorneys' fees. In my view, the Secretary is only seeking to win on the back end what he has lost so resoundingly on the front end.

For to the extent that he discourages private attorneys from taking disability cases, the Secretary wins the final and most important round of the fight, the individual claim of the class member granted a review. The patient suffering of disabled class members means nothing if the claimant loses his or her individual claim for benefits.

And, in my experience, lose they will if they attempt to negotiate the administrative system unrepresented. Social Security's own statistics bear this truth out. According to SSA in 1986, unrepresented claimants won their cases at the hearing level in only 36.3 percent of the cases. This win rate, however, increased by over 65 percent if the claimant was represented by counsel; 60.1 percent of represented claimants won at the hearing stage.

I think it would be tremendously naive to take SSA at its word when they count the savings of millions of dollars for beneficiaries as the motive behind the institution of their latest policy. For months, SSA has been trying to institute measures to discourage the additional contingent fee arrangement commonly used in these cases.

As the subcommittee well knows, the process of fee approval and payment is already very slow. The Secretary's current policy will doubtless add further delay to an already slow process for fee petitions greater than $1,500. This added disincentive will directly affect and discourage representation of *Hyatt* class members in North Carolina or other claimants with long standing claims.

In my experience, older claims are the most difficult to prove because of the passage of time, memory, and because of the inherent problems of developing medical records. Cases with proof problems require more attorney time. Consequently, older claims, though potentially more lucrative because of larger possible back benefits, look far less attractive when the case not only demands more development and a greater commitment of time, but also carries a risk of collecting less than a full fee, and one more remote in time at that. Of course, in my view, these cases with large amounts of back benefits at stake are the very cases in which SSA is seeking to discourage representation and, hence, success for claimants.

Finally, I would like to say that the issue of reasonable attorneys' fees is, in my view, merely a smoke screen used to disguise the real problems of the administrative system. The importance of private attorneys in these cases cannot be underestimated. But their involvement might take a less prominent role if the system itself were more accurate.

In 1986, claimants at the initial and reconsideration levels were denied, respectively, in 61 and 83 percent of the cases. If the claimant had the tenacity to appeal to the ALJ stage, 49 percent of these denials were overturned. These statistics demonstrate the need for attorney involvement remains critical for a fair, accurate and just determination of disability cases.

I want the disabled citizens of North Carolina and this country to receive an accurate determination of their claims. I want the outstanding work of Robinson, Bradshaw & Hinson—a private law firm in Charlotte, N.C., that committed over 2,000 hours pro bono publico to the *Hyatt* case—to be realized in practical terms for the thousands of class members eligible for the relief *Hyatt* has achieved. This means keeping private attorneys involved in the individual cases of class members.

SSA's current policy will discourage this involvement.

Thank you.

[The statement of Mr. Sasser follows:]

TESTIMONY OF MAC SASSER
MANAGING ATTORNEY
LEGAL SERVICES OF SOUTHERN PIEDMONT

My name is Mac Sasser and I am a managing attorney for Legal Services of Southern Piedmont, Inc., in Concord, N. C. and Charlotte, N. C. I would like to thank the subcommittee for its invitation to present my views on the recent policy developments at the Social Security Administration (SSA) on attorney's fees. I believe that these developments -- and the tendency they portend -- will, if unchecked, cause grave consequences for millions of disabled citizens of this country.

For five and a half years I have worked as a legal services attorney; I have never practiced in the private bar. I have represented scores of individual disability claimants and have served as counsel in Hyatt, et al. vs. Heckler, a class action against SSA based on its nonacquiescence to the case law of the Fourth Circuit. Through my role in Hyatt over the last three years, I have worked with hundred of private attorneys throughout North Carolina who handle disability cases on a regular or occasional basis.

In Hyatt, the plaintiff class demonstrated that SSA deliberately ignored controlling precedent in deciding the cases of claimants and beneficiaries. Consequently, the federal courts have held that the plaintiffs are entitled to new reviews of their claims under proper, lawful standards. SSA estimates that over ninety thousand (90,000) North Carolinians may be entitled to this relief. And Hyatt is only one of a number of similar lawsuits won by plaintiffs across the country.

This has been no easy victory, however. In Hyatt, SSA has resisted, fought and appealed every decision for plaintiffs rendered at every level of our federal judiciary. Indeed, the Secretary appears poised to appeal once again by petitioning the Supreme Court for certiorari of the Fourth Circuit's latest decision -- one fully in favor of class members. Such a petition, if filed by the Secretary, could delay yet again the just resolution of the claims of as many as eighty thousand (80,000) disabled North Carolinians -- relief first granted over three years ago by the federal district court.

It is with this experience that I offer these remarks on the Secretary's current policy and recent proposals on attorney's fees. In my view, the Secretary is only seeking to win on the back end what he has lost so resoundingly on the front end.

For to the extent that he discourages attorneys from taking these cases, the Secretary wins the final and most important round of the fight: the individual claim of the class member granted a review. No matter the splashy headlines and jubilant editorials proclaiming victory for the disabled; no matter the grand estimates of the thousands of disabled citizens who may finally get a fair determination of their claims; no matter the thousands of untold stories of daily courage and acts of will necessary for these people to survive yet another day, another week, another month, another year. These victories and the patient suffering of the disabled mean nothing if the claimant loses his or her individual claim for benefits.

And in my experience, lose they will if they attempt to negotiate the administrative system unrepresented. Social Security's own statistics bear this truth out. According to SSA, in 1986 unrepresented claimants won their cases at the hearing level in only 36.3% of the cases. This win rate increased by over 65% if the claimant was represented by counsel: 60.1% of represented claimants won at the hearing stage.

Though SSA might characterize this view as somewhat cynical, I think it would be tremendously naive to take SSA at its word when they tout the saving of millions of dollars for beneficiaries as the motive behind the institution of their latest policy. For months SSA has been trying to institute measures to discourage the traditional contingent fee arrangement commonly used in these cases.

A little over a year ago I testified before this Subcommittee in opposition to the suggestion that SSA might move away from withholding fees from back benefit awards or might deregulate the attorney fee process altogether.

In August of last year, SSA proposed "own-motion" reviews of those attorney's fees approved by an ALJ. These proposals having died on the vine, SSA is now attempting yet another means of frustrating the collection of fees by private attorneys.

As the Subcommittee well knows, the process of fee approval and payment is already very slow. The Secretary's current policy will doubtless add further delay to an already slow process for fee petitions greater than $1500. This added disincentive will certainly discourage representation of Hyatt class members or other claimants with longstanding claims.

In my experience, older claims are the most difficult to prove because of the passage of time and memory and because of the inherent problems of developing medical records. Cases with proof problems require more attorney time. (Cases with proof problems are not necessarily bad cases. Most often, the problem of proof is based on insufficient medical records. In turn, insufficient medical records are most often the result not of low need for medical care, but of the inability to buy regular care. Disabled people without jobs or income are generally unable to afford regular medical care). Consequently, older claims, though potentially more lucrative because of larger possible back benefits, look far less attractive when the case not only demands more development and a greater commitment of time, but also carries a risk of collecting less than a full fee, and one more remote in time at that. Of course, in my view, these cases -- with large amounts of back benefits at stake -- are the very cases in which SSA is seeking to discourage representation and, hence, success for claimants.

In closing, I would like to share several observations about the Secretary's March 31 policy.

First, the March 31 policy appears to be based at least in part on the "finding" found in the Inspector General's January 14, 1987, Improvements Needed In Attorney Fee Process Could Save SSA Beneficiaries Millions (hereinafter, "IG Report) that "ALJ's were for the most part giving perfunctory approval to fee arrangements agreed to between attorneys and clients." From my conversations with North Carolina attorneys, this just does not happen or, if it does, it is the exception and is anything but perfunctory. In fact, most private attorneys I have spoken with find that their fees are cut routinely. And over the last year and a half, they find that their fees have been cut to a greater extent and that payment has taken increasingly more time.

Second, the statistics cited in the IG Report simply do not show, in my view, a situation in need of repair. According to the IG Report, 75% of fee awards yield hourly rates at less than $100 per hour, with 55% at less than $75 per hour. The exceptional 4% of the awards in excess of $200 per hour are just that: exceptional.

Third, SSA's stated motive to reduce the fee authorization workload of ALJs is belied by the requirements of the March 31 policy. The work once necessary to approve a fee over $3,000 will now be imposed at the lower level of $1500. In addition, the workload of ALJs in both the Hearing and Regional Offices appears to be increased by new reporting and administrative requirements.

Fourth, the entire policy overlooks the fundamental nature of the contingent fee agreement between the claimant and attorney: if the case is lost, the attorney receives nothing. This reality makes necessary the receipt of a full fee in those cases won by the attorney. Otherwise, the system will encourage private attorneys to accept for representation only the "easy" cases -- those where no development is necessary or where no issues of fact or law must be studied and resolved.

The Fourth Circuit of Appeals set out the parameters of this issue in McKittrick v. Gardner, 378 F.2d 872 (4th Cir. 1967), a case holding that the contingent nature of the fee should be a significant factor in determining the amount of the fee in a Social Security case:

> Availability of lawyers to such claimants is of the highest importance, and if a lawyer is to receive no compensation unless there is a award, his compensation is contingent whether or not he has a contract that says so. Most of the disability claimants have no other resources for the payment of fees. The contingency of compensation, whether it stems from an employment contract or results from the claimant's indigency, is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will

> not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services. Charges on the basis of a minimal hourly rate are surely inappropriate for a lawyer who has performed creditably when payment of any fee is so uncertain.

Fifth, to the extent that the March 31 Policy is based on the IG Report presumption that $75 per hour is "reasonable" because this amount is set by the Equal Access to Justice Act (EAJA), the policy is wrong. The EAJA does not mandate a $75 per hour fee as reasonable per se, but instead uses this number as a benchmark which may be increased by a court to reflect cost-of-living increases or other special factors. 28 U.S.C. §2412(d)(2)(A). In fact, the application of only the current Consumer Price Index to the rate of $75 per hour will result in an hourly amount in excess of $95.

Finally, I would like to say that the issue of reasonable attorney's fees is, in my view, a smokescreen disguising the real problems of the administrative system. The importance of private attorneys in these cases cannot be underestimated. But their involvement might take a less prominent role if the system itself were more accurate. In 1986, claimants at the initial and reconsideration levels were denied respectively, in 61% and 83% of the cases. If the claimant had the tenacity to appeal to the ALJ stage, 49% of these denials were overturned. These statistics demonstrate that the need for attorney involvement remains critical for a fair, accurate and just determination of disability cases.

I want the disabled citizens of North Carolina and this country to receive an accurate determination of their claims. I want the outstanding work of the firm of Robinson, Bradshaw and Hinson on the Hyatt case -- over 2,000 hours donated pro bono publico -- to be realized in practical terms for the thousands of class members eligible for the relief this lawsuit has achieved. This means keeping private attorneys involved in the individual cases of class members. SSA's current policy will discourage that involvement.

Chairman **Jacobs**. Thank you.

Mr. Archer.

Mr. **Archer**. I have no questions, Mr. Chairman. Thank you for your testimony.

Chairman **Jacobs**. I just have one question of Mr. DeBofsky.

Did I understand you to say, referring to claimant orders, we take cases we know we will lose? Is that what you said?

Mr. **DeBofsky**. I did say that.

Chairman **Jacobs**. Why do you do that?

Mr. **DeBofsky**. Because it is very hard when you have a disabled client in your office to say that you are not going to represent them. I know I take cases on that basis. I know every other attorney who practices in this area does.

When we get a call from a client asking us to represent them, we have no way of determining before they come into the office, and generally even before we get their medical records, whether or not it is going to be a successful claim. It's very hard to get out of a disability claim once an appointment of representative form has been signed and entered with the Social Security Administration.

Chairman **Jacobs**. But you say that you take cases that you know you will lose.

You surely don't mean to say that for the record, do you?

Mr. **DeBofsky**. I do mean to say that because there are cases that I know I am going to lose, but I am willing to spend the time——

Chairman **Jacobs**. You are not saying it's cases you suspect you will lose or there's a good chance you'll lose. You are saying you will take cases you know you are going to lose. That sounds like classic common law abuse of process to me. You don't really mean to say that, do you?

Mr. **DeBofsky**. Well, if you make that distinction, no, I don't mean to say that.

Chairman **Jacobs**. Good. Okay. I thought you might want the record cleared up on that.

Mr. **DeBofsky**. There is always a possibility of winning, but there are cases that appear exceptionally——

Chairman **Jacobs**. There's a possibility of winning, you don't know you are going to lose, right?

Mr. **DeBofsky**. That's true.

Chairman **Jacobs**. Okay. I thank the panel, the committee thanks the panel.

And our final panel today consists of Mr. Edward Atkins of West Virginia; Joel Friedman, Phoenix, Ariz.; Stephen Gorey, San Diego; and Robert Rolnick of Houston, Tex.

Mr. **Archer**. Mr. Chairman, if I might be granted the indulgence of the Chair, I would like to personally welcome Mr. Rolnick from my hometown of Houston, Tex., and tell you that we are glad to have you with the committee at this point.

Chairman **Jacobs**. I should make a special welcome to Mr. Atkins too. He is the constituent, I believe, of our friend, Bob Wise.

STATEMENT OF EDWARD G. ATKINS, ESQ., CHARLESTON, WV

Mr. ATKINS. I wish to thank the members of this committee, and particularly Congressman Wise, for this opportunity to address this committee on the subject of Social Security Administration procedures in awarding attorneys' fees and recommendations for changes in the process.

I am a sole practitioner engaged in general law practice in Charleston, WV. Since about 1971, as a part of my local law practice I have regularly represented claimants in Social Security disability cases. This representation includes appearing at the hearing for claimants before the Social Security Administration and also appearing for claimants before the local Federal district court.

Now, you know the act authorizes the Secretary to determine a reasonable fee. As a matter of practice in my area, it has been customary to represent claimants for a fee of 25 percent of past-due benefits contingent upon the granting of an award because that is just what the Secretary withholds, that's what the law provides be withheld from the past-due benefits.

For a number of years, the administrative law judge having jurisdiction over a case had the authority to grant up to $3,000. This has been reduced to $1,500 with, at least in my mind, a strong suggestion that no fee be authorized in excess of $75 per hour.

The implementation of this policy, and particularly the imposition of the $75 per hour criteria will probably preclude me from continuing to represent claimants in Social Security disability cases. The $75 per hour criteria is inadequate both because the hourly rate is too low and, more importantly, because it does not take into consideration the contingency nature of this work in those instances.

The $75 per hour figure has been advanced as reasonable. I wish it were so, but the cost of all services today is high. I had to move some telephones in my office recently. The AT&T man charged $70 per hour. I had to have my recording machine repaired. The cost of this was $66 an hour. I had some IBM word processing equipment. The service on this was $158 per hour. Rather than sticking to a straight hourly figure, the contingent arrangement seems to be the most satisfactory for all concerned.

I realize that the Social Security Administration does not consider the attorney's decision to conduct business on a contingency basis relevant to determining fees. However, in the real world, this is very often the only basis upon which a claimant can afford counsel. All who seek Social Security disability benefits are not working, and most have no spare resources for attorneys' fees. It is unfortunate that successful claimants must bear the financial burden of fees for those that are unsuccessful. That is the nature of the system.

I would estimate that fully implemented, this policy would cut attorneys' fees from one-third to a half. For most it would make continued representation of claimants in these cases very unattractive and would certainly discourage an attorney from taking the marginal or doubtful case. Under the new policy, I believe that representation in SSI cases would virtually disappear.

I have no information that there is widespread dissatisfaction with the current system among the people most affected, that is claimants. Excessively restrictive fee regulation is generally suggested by regulators in terms of fairness in protection of the claimant. Unfortunately, I see the implementation of this policy as driving claimant's representatives from this field.

That an excessively restrictive fee policy will drive claimant's representatives from a benefit field is amply illustrated by what has occurred in the field of Federal black lung cases. I used to represent regularly claimants in Federal black lung cases before the Social Security Administration and then the U.S. Department of Labor. Due in part to what I consider to be an abnormally restrictive fee policy, I no longer engage in this type of work, and most other attorneys that I know who used to work in this field no longer do this practice. This could be the fate of Social Security representation if the current fee policy is fully implemented.

I support the NOSSCR proposal of a presumptive reasonable fee of 25 percent of past-due benefits to a maximum of $4,000. I believe that this proposed reform is sound because it would provide for adequate fees for claimants while protecting the claimant from the relatively few who would abuse a completely unregulated fee system.

I realize that fee disputes do not engender sympathy as far as lawyers are concerned. However, the lawyer can usually find other work to do. The claimant may not necessarily be able to engage competent representation. This, of course, is the crux of the matter.

I believe that current policy will discourage competent representation of claimants in Social Security cases. I believe that the NOSSCR proposal would do exactly the opposite, and I would encourage its support and adoption.

Thank you very much.

[The statement of Mr. Atkins follows:]

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
WAYS AND MEANS SUBCOMMITTEE ON SOCIAL SECURITY

STATEMENT OF EDWARD G. ATKINS
May 13, 1987

I wish to thank the members of this Committee and particularly Congressman Wise for the opportunity to address this Committee on the subject of Social Security Administration procedures in awarding attorneys fees and recommendations for changes in this process.

I am a sole practitioner engaged in general law practice in Charleston, West Virginia. Since 1971, as part of my local law practice, I have regularly represented claimants in Social Security disability cases. This representation includes appearing before the Social Security Administration and also appearing for claimants before the local Federal District Court.

As you may know, the Social Security Act authorizes the Secretary of Health and Human Services to determine a reasonable fee for representing claimants in Social Security cases. What is reasonable is determined under a rather involved set of criteria established by regulation (See C.F.R. 404.1725). The statutes further authorize the Social Security Adminstration to withhold up to 25% of claimants past-due benefits for payment of attorneys fees. It has become customary in my area of law practice to represent claimants for a fee of 25% of past-due benefits contingent upon the granting of an award.

For a number of years the Administrative Law Judge having jurisdition over a particular case had the authority to grant a fee up to $5,000.00. The Social Security Administration has reduced this authority to $1,500.00 with, at least to my mind, a strong suggestion that no fee be authorized in excess of $75.00 per hour.

The implementation of this policy and particularly the imposition of the $75.00 per hour criteria will probably preclude me from continuing to represent claimants in Social Security disablility cases. The $75.00 per hour criteria is inadequate both because the hourly rate is too low and more importantly because it does not take into consideration the contingency nature of this work.

The $75.00 per hour figure has been advanced as reasonable in these cases. I wish it were so but the cost of all services today is high. I had to move some telephones in my office recently. The AT&T repairman charged $70.00 per hour. I had to have my recording machine repaired. The cost of this service was $66.00 per hour. I have some IBM word processing equipment. Service on this is $158.00 per hour. Rather than sticking to a straight hourly figure, the contingent arrangement seems to be the most satisfactory for all concerned.

I realize that the Social Security Administration does not consider the attorney's decision to conduct business on a contingency basis relevant to determining fees, however, in the real worked this is very often the only basis on which a claimant can employ counsel. All who seek Social Security disability benefits are not working and most have no spare resources for attorneys fees. It is unfortunate that successful claimants must bear the financial burden of fees for those that are unsuccessful, but that is the nature of the system. I would estimate that fully implemented, this policy would cut attorneys fees from one-third to one-half. For most it would make continued representation of claimants in these cases very unattractive and would certainly discourage an attorney from taking the marginal or doubtful case. Under the new policy I believe that representation in S.S.I. cases would virtually disappear.

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I have no information that there is widespread dissatisfaction with the current system among the people most affected, that is, claimants. Excessively restrictive fee regulation is generally suggested by regulators in terms of "fairness" or "protection of the claimant." Unfortunately, I see the implementation of this new policy as driving claimant's representatives from this field.

That an excessively restrictive fee policy will drive claimant's representatives from a benefit field is amply illustrated by what has occurred in the field of Federal Black Lung cases. I used to regularly represent claimants in Federal Black Lung cases before the Social Security Administration and then the United States Department of Labor. Due in part to what I consider to be an abnormally restrictive fee policy, I no longer engage in this type of work and most other attorneys that I know who used to work in this field no longer do this practice. This could be the fate of Social Security representation if the current fee policy is fully implemented.

The National Organization of Social Security Claimant's Representatives (NOSSCR) proposes a "presumptive" reasonable fee of 25% of past-due benefits to a maximum of $4,000.00. This presumption would disappear should either the claimant or representative object. I believe that this proposed reform is sound because it does provide for adequate fees for claimant representation while protecting the claimant from the relatively few who would abuse a completely unregulated fee system.

I realize that fee disputes do not engender sympathy as far as lawyers are concerned, however, the lawyer can usually find other work to do. The claimant may not necessarily be able to engage competent representation. This, of course, is the crux of the matter. I believe that current policy will discourage competent representation of claimants in Social Security cases. I believe that the NOSSCR proposal would do exactly the opposite and I would encourage its support and adoption.

Thank you,
Edward G. Atkins
Attorney-at-Law
608 Virginia Street, East
Charleston, WV 25301

Chairman JACOBS. Thank you, sir.
Mr. Friedman.

STATEMENT OF JOEL F. FRIEDMAN, ESQ., PHOENIX, AZ

Mr. FRIEDMAN. Mr. Chairman, members of the committee, it is my privilege to appear today to address the issue of how to assure access to competent legal counsel for individuals who have been unable to secure Social Security benefits on their own.

I request that my written statement be admitted to the record of these proceedings.

I would like to identify myself as Joel Friedman, a private attorney in Phoenix, Ariz., who is here today representing a group of eight attorneys who regularly practice before the Social Security Administration.

I have been in private practice for approximately 4½ years, and I worked for Health and Human Services defending administrative law judges' decisions in district courts in Pennsylvania, West Virginia, Virginia, Maryland, and Delaware, while I was a law student.

The question here is not simply whether one system is better than another for determining fair compensation to a lawyer for successful representation of a claimant before the Social Security Administration.

The problem is more properly what can, and should, be done by the legislature to intervene in an ongoing dispute between the agency and attorneys who have prevailed for their clients. Those of us who focus our law practices on Social Security cases do so to provide a measure of assistance to those who simply cannot, for reasons of education, language and health, explain to the Social Security Administration in appropriate terms why they should receive disability benefits. Our clients are the truly disenfranchised, the sick and injured, the broken, members of the fringe elements of our society. They live on the streets or in the riverbeds of Phoenix, in temporary shelters, in halfway houses, and in neighborhoods that no one chooses to live in, but in which they are forced to reside by circumstance.

Many of our clients have no income or the minimal subsistence benefits, general assistance, aid to families with dependent children, food stamps, or other basic programs, and they own no property except what can be carried in a couple of shopping bags or in a grocery cart.

While some clients do have their own homes, they also have been forced to reduce their living arrangements and their life style, not by choice, but because of the absence of viable options.

Social Security disability claimants frequently are unable to offer more than minimal assistance to their attorneys the result of incapacitating medical conditions, and educational or cultural disadvantages. They do not easily understand why a claim has been denied nor what must be done to prove the case.

These are the real people who come to us for help, and we provide the assistance necessary to sustain that individual during the pendency of their appeal.

We do more than gather existing medical records, as we obtain clarifications and relevant explanations from treating physicians, or refer our clients to proper specialists for evaluation, generally advancing the expense of developing evidence for the case, advancing costs to a person who otherwise has no proof to substantiate their claim.

We also refer our clients to social service agencies so their utilities are not shut off and so they can get food boxes to feed themselves and their families. We send our clients to places where they can receive vital medical attention that is affordable.

Our services as attorneys, and those we willingly provide just to keep our clients alive, are crucial to the survival of these people and not to their financial betterment alone.

We act at the same time as a buffer for the Social Security offices, especially the administrative law judges, who would otherwise be at the receiving end sometimes of half a dozen telephone calls a day from paranoid, anxious, depressed, or simply frustrated and angry claimants.

Our clients and their cases, involving technical interpretations of statutes and medical issues not generally within the basic expertise of lawyers, are not desirable cases in the legal community. Our clients do not mix with corporate clients and they generally find themselves in an office where they are with other people in similar straits.

Social Security claimants have access only to a small group of attorneys, and in my area of Maricopa County, Ariz., there are approximately 3,500 members of the bar association, but no more than ten attorneys practice frequently before the Social Security Administration.

Whatever empty rationalizations the Secretary may propose, the contingency contracts between lawyers and claimants are facts of life and they are here to say. No hourly rate can be utilized, even as a benchmark, to calculate fair and reasonable compensation for services provided with the entire risk of loss placed on the attorney.

Reality intrudes unpleasantly into any fantasy of Social Security claimants paying their lawyers on an hourly noncontingent basis, as they have no resources to commit except the potential back due benefits paid if the attorney is successful. In a contingent fee system, some clients will pay more than others, but none will ever pay an attorney for time and effort that ultimately is ineffective.

Those claimants that do compensate their lawyers with 25 percent of retroactive benefits obtain an additional substantial financial gain, for and from which no fees are charged, as they continue to receive monthly benefits including Medicare coverage, for as long as they meet the standards of disability under the act.

The system prior to March 31, 1987, was working relatively effectively, although not without complaints from both attorneys and claimants. That system did provide, however, for a semblance of review. No claimant was ever denied the right to comment upon and appeal a fee authorization. Attorneys, on the other hand, had no legitimate appellate process, but simply accepted what was approved.

The person that reviewed the fee petition, though, generally understood the particular case, the individual attorney, and the entire Social Security adjudicative system, as well as the reality of representing Social Security claimants, and had a logical foundation on which to premise fee assessments.

In response to some earlier comments I can tell you as a fact the new process has resulted in fee awards calculated entirely and exactly at $75 an hour, with no consideration of any other pertinent factors. These fee authorizations were issued in response to fee petitions filed before March 31, 1987, and we have no effective means of having those fees reviewed again.

The more experienced, more efficient attorney will be penalized under the new system because it will have taken that attorney less time than the novice lawyer, although fees will be authorized at the same hourly rate. No review is available because the regional chief ALJ is generally going to approve the more substantial fees, and that was the person we went to if we had a protest about the presiding ALJ's fee award.

The time required to review fee petitions will also be extended, as a presiding ALJ has to analyze petitions and recommend a fee award that is then reanalyzed by the regional chief ALJ. Where we now have fee petitions that have not been approved more than 6 months after filing, the duplicative effort on significant numbers of petitions dictated by the new system will present a further obstacle to encouraging attorneys to accept Social Security cases.

Under the old system, claimants were assured access to competent counsel no matter how valuable a claim they had, as long as there was identifiable merit and a reasonable opportunity for successful representation. Those assurances have been dissipated by the Secretary's recent policy changes and modifications predicated on unjustifiable inferences from invalid statistical data.

We urge you, for now, to at least direct the Secretary to reinstate the authorization procedure that existed prior to March 31, 1987, including local ALJ approval limits of $3,000. A moratorium on further changes will allow for a period of reasoned deliberation involving representatives of all affected participants in the Social Security claims process, and, hopefully, intelligent assessment of viable alternatives for ensuring claimants access to competent counsel, who in turn can anticipate reasonable compensation for their successes.

I would like to thank you for your patience and attention, and answer any comments or questions.

[The prepared statement and attachments follow:]

TESTIMONY OF JOEL F FRIEDMAN, ESQUIRE REPRESENTING THE GREATER PHOENIX DISABILITY COUNSEL ASSOCIATION

BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY
COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON ATTORNEYS' FEES
IN SOCIAL SECURITY DISABILITY CASES
May 13, 1987

Mr. Chairman:

It is a privilege to address this committee today, as a representative of disability claimant attorneys in the Phoenix, Arizona area, on the issue of how to determine reasonable attorneys' fees for representing individuals in administrative proceedings before the Social Security Administration. I would like to preface my remarks with a brief quote that illustrates the origin and nature of the current dispute.

> "No, no!" said the Queen. "Sentence first - verdict afterwards.
> "Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"
> "Hold your tongue!" said the Queen, turning purple.
> "I won't!" said Alice.
> "Off with her head!" the Queen shouted at the top of her voice. Nobody moved.

Lewis Carroll, *Alice's Adventures in Wonderland* 118
(Schocken Books, NY, NY 1978)

I. INTRODUCTION

So commanded the Queen of Hearts at the end of one of the most famous trials in History, a proceeding to determine whether the Knave of Hearts had stolen the Queen's tarts, none of which were missing. In similar fashion, Otis Bowen, M.D., Secretary of the Department of Health and Human Services, through the auspices of his Office of Inspector General and under the direction of Eileen Bradley, Associate Commissioner of the Social Security Administration's Office of Hearings and Appeals, has passed judgment on attorneys representing individuals with claims for Social Security disability or other benefits. No tarts have been stolen, but punishment must issue. The problem with the Secretary's sentence, however, is that the penalty will be paid primarily by the claimants, who have not complained about the attorneys' fees paid to obtain benefits from a renegade agency.

II. SOCIAL SECURITY ATTORNEY FEE AUTHORIZATION RULES AND PROCEDURES

The Social Security Act provides that the Secretary

> may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Secretary under this title.... Whenever the Secretary, in any claim before him for benefits under this title, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding section) a reasonable fee to compensate such attorney for the services performed by him in connection with such claim.

42 U.S.C. §406(a).

Administrative regulations lawfully promulgated by the Secretary state that analysis of attorney fee petitions requires consideration of multiple factors, including that "the purpose of the social security program...is to provide a measure of economic security for the beneficiaries of the program." 20 C.F.R. §404.1725(b)(1). In the income and resource-dependent Supplemental Security Income (SSI) program, the intended objective is "to assure a minimum level of income for the beneficiaries." 20 C.F.R. §416.1525(b)(1). The fee authorization process also involves evaluation of

> (i) The extent and type of services the representative performed;
> (ii) The complexity of the case;
> (iii) The level of skill and competence required of the representative in giving the services;
> (iv) The amount of time the representative spent on the case;
> (v) The results the representative achieved;
> (vi) The level of review to which the claim was taken and the level of the review at which the representative became your representative; and
> (vii) The amount of fee the representative requests for his or her services....

20 C.F.R. §§404.1725(b)(1) & 416.1525(b)(1).

The courts, in applying the statutory attorney fee rules, have generally recognized that there are additional significant elements that must be considered, perhaps foremost among them being the public interest in encouraging competent lawyers to accept clients with Social Security claims. See, e.g., MacDonald v. Weinberger, 512 F.2d 144, 146 (9th Cir. 1975); Derby v. Bowen, 636 F.Supp. 803, 809 (E.D.Wash. 1986); Duggan v. Secretary of Health and Human Services, 537 F.Supp. 1198, 1201 (D.S.C. 1982), quoting McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967). Intangibles that cannot easily be assessed after the attorney has prevailed, but which are material to the fee analysis, require consideration as well. These intangible factors include the virtually universal contingent nature of the contract between the Social Security claimant and the lawyer, where no compensation is paid if no benefits are obtained, see Duggan, supra; the "opportunity cost" to the attorney in pursuing the particular case to the exclusion not only of similar cases, but also of other work that is not compensated by contingent fees; the experience, reputation, and ability of the lawyer; and the "undesirability" of the case in the local legal community. Measurable factors mentioned for the typical Social Security fee analysis are the customary fee charged and received for similar work, time limitations imposed by the client or circumstances, attorney fee awards in similar cases, and the amount in controversy. See Bailey v. Schweiker, 537 F.Supp. 173, 174 (W.D.Va. 1982). See also Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), citing Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) and American Bar Association "Code of Professional Responsibility," Disciplinary Rule 2-106.

The above rules for determining "reasonable" attorneys' fees were effectuated, prior to March 31, 1987, by filing a Petition to Obtain Approval of a Fee for Representing a Claimant Before the Social Security Administration at the agency level that issued the favorable determination, usually at the local Office of Hearings and Appeals (OHA). The Petition is a Social Security form containing a certification by the signer that the information therein is accurate, and providing space for itemization of the date, nature, and length of time needed to perform specific services to the client. The form also has a place to denote the type of fee agreement between the claimant and the lawyer.

Pursuant to a March 31, 1987 Memorandum from Associate Commissioner Bradley, though, jurisdiction to review Petitions requesting more than $1,500.00 in attorneys' fees was removed from the local OHA to the Regional Chief Administrative Law Judge (ALJ). Prior to March 31, 1987, the ALJ who had presided over adjudication of the case was responsible for assessment of the petition and approval of the fee the attorney would be permitted to charge and receive from the client, subject to a limit of $3,000.00. It is this modification of the fee authorization process that is the subject of the current dispute between the Social Security Administration and claimant-representatives.

III. PRESENT ATTORNEY FEE APPROVAL POLICIES AND PROCEDURES

When an ALJ, prior to March 31, 1987, was asked to consider a Petition for authorization to charge and receive attorneys' fees in a Social Security claim, in an amount less than or equal to $3,000.00, the lawyer was assured that the person reviewing the Petition was familiar with the nature, extent, and quality of the services that had been provided effectively on the claimant's behalf. The ALJ was personally aware of the complexity of the case, knowing what issues and questions of proof were involved, and was in the best position to decide what level of skill and competence had been required of the attorney to represent the client successfully. The presiding ALJ knew the reputation, experience, and ability of the lawyer, and whether the attorney was engaged in a practice of law that concentrated on Social Security cases, thereby providing a basis for estimating the "opportunity cost" to the attorney for representing the claimant in that particular case.

The ALJ who heard the case and was ultimately convinced by the attorneys' efforts of the merits of the claim, could determine if it was one where the claimant was likely to have been able to retain other counsel or would have been forced to present an "undesirable" claim without assistance. The local ALJs understand the availability of qualified attorneys for Social Security cases, a more general factor in assessing the desirability, in the legal community, of accepting such work in the first instance. The presiding ALJ is aware of the customary charges and actual fee awards in comparable cases. With a local attorney fee authorization limit of $3,000.00, lawyers maintaining a practice focusing on Social Security claims could anticipate reasonable compensation for their work in the vast majority of cases. No such expectations are valid, however, if the ALJs only review the low range of fee petitions and an unidentified individual, whose competence in calculating reasonable attorneys' fees is unknown, has sole authority to approve the higher range of fee requests.

The practical effect of the Secretary's new policy and procedure is that fee petitions even for relatively low dollar amounts, but exceeding the $1,500.00 limit, will be reviewed by Social Security employees who have no concept of the administrative adjudicative process or the function of attorneys. The Regional Chief ALJs probably will not personally analyze the fee petitions, but will delegate such tasks to individuals with no regular exposure to the realistic requirements of representing Social Security claimants. The fee petition reviews will be conducted in an environment devoid of any contact with the factors essential to a rational determination of reasonable attorneys' fees for Social Security cases, as the Regional OHAs are involved more with administration of the local offices than individual claims processing. The Regional offices have no knowledge of the availability of attorneys to represent Social Security claimants at the local OHAs, are not familiar with the individual attorneys, and simply cannot reflect accurately from a distance, and after the fact, on the relative complexity of questions and problems of proof present in the particular case.

The result of the March 31 directive from Associate Commissioner Bradley, already apparent from recent fee authorizations, is that ALJs will likely be awarding fees based solely on an hourly scale, with no consideration of any of the elements prescribed by the lawful regulations. It is not difficult to conceive how the policy changes will be implemented when not even the presiding ALJ reviews the petition and fees are set by an employee who has never participated in a Social Security hearing. The fee petitions may not be evaluated by an attorney at all, and it is, at best, difficult for a non-lawyer to assess the value of a lawyer's contributions to an ALJ's ultimate conclusions and decision. Such efforts cannot be easily quantified and then multiplied by a random factor to arrive at a valuation, and the determination of "reasonable" attorneys' fees in Social Security claims must necessarily be predicated essentially on subjective judgments best made by a participant in the proceedings.

Despite the equally important objective of ensuring that attorneys will continue to represent Social Security claimants, the present fee policies are premised on a spurious, self-indulgent, and patently unjustified rationalization that claimants in Social Security proceedings require protection from their lawyers. It is not a little curious that in its response to the statistically suspect report of the Inspector General, the agency admits there have been no indications whatsoever that the claimants are dissatisfied with or contest regularly the attorneys' fees that have been authorized under the prior system. In a not entirely rhetorical question, one must wonder why, and to what end, the Social Security Administration (SSA) has undertaken such an investigation of a nonexistent problem, diverting limited resources from more appropriate and immediate concerns.

In view of the absence of complaints or objections from claimants, including the extreme examples cited in the Inspector General's analysis, the Secretary's motives in ordering a study that only criticizes compensating lawyers adequately for successfully representing claimants before the agency must be examined carefully. In an agency that cannot process appeals of adverse ALJ decisions in less than six months, that refuses to comply with unequivocal legal rulings of the federal courts, and that fails utterly to perform its duties even after specific Congressional direction, the stated reasons for an investigation of attorney fee awards and disruptive changes in the procedures, outside applicable rulemaking standards, should be reviewed with more than a modicum of suspicion.

Whether intended or not, a potential result of the policies and procedures now being implemented is that the additional obstacles to obtaining fair and reasonable fees will discourage attorneys from continuing the extensive representation of Social Security claimants made possible by the previous system. The Secretary is fully aware of statistics showing that represented claimants prevail in approximately 60 percent of the cases, while those without attorneys are successful only about 36 percent of the time, at hearings before ALJs, and it is naive to disregard the consequent financial "benefit" if fewer competent attorneys maintain a Social Security claims practice. The advantage of eliminating attorneys from Social Security proceedings will not redound to claimants, but to the SSA, offering a third level of claims processing at which to ignore applicable statutory, regulatory, and judicial standards.

The representations of attorneys throughout the country that they will have to selectively accept Social Security claimants as clients are not idle threats, but realistic responses to a deteriorating administrative adjudicative system. The Secretary criticizes a procedure that has resulted in an average hourly fee rate of only $71.00, completely ignoring the fact that eliminating or diminishing the higher range of fees will substantially reduce that average well below even what the Inspector General suggests is "acceptable." The base rate deemed appropriate, moreover, reflects a decided ignorance of reality, with respect both to the type of work involved in Social Security disability claims and to the general range of attorney's fees in legal communities.

Disability cases involve medical questions almost exclusively, and it is impertinent for the Secretary to conclude that most such claims have no complicated issues for attorneys, who usually have no formal medical training, to evaluate and obtain explanatory evidence to satisfy the burden of proving disability to an ALJ. Attorneys practicing law in the Social Security field must continually educate themselves on medical background, time that is rarely, if ever, recorded on fee petitions for particular cases. Social Security disability claims require knowledge of multiple areas of medicine, at least at basic levels of information, to present an intelligible and effective case for the client. There is no validity to any complaints by the Secretary that Social Security hearings are "nonadversarial," as ALJs are not reluctant to take positions properly characterized as in defense of the trust fund from which benefits are paid. Policies and procedures of the state disability determination services and Social Security district/field offices, furthermore, often result in accumulation of incomplete or incompetent evidence that must be refuted by the claimant and his/her attorney, both by documentation and argumentation before the ALJ.

The Secretary has merely presumed that $75.00 per hour is a reasonable rate of compensation for skilled attorneys concentrating on a specialized area of legal practice, but the basis of that assumption is fatally flawed. There is no substantiation for the Inspector General's analogy to fee rates established by the Equal Access to Justice Act, which effectively provides for sanctions against an agency when it has no excuse for denying or litigating a claim, and the hourly rate selected is incompatible with fees charged by attorneys specializing in other fields of law. A comparable example is attorneys representing insurance companies on flat, non-contingent fees for medical-legal cases, with compensation routinely in the range of well over $100.00 per hour.

The hourly fee suggestion is also irresponsible in view of the unavoidable contingent nature of fee agreements between attorneys and Social Security claimants. While it is a favorite point of contention for the Secretary, there is no viable alternative except payment of all fees, win or lose, by the agency or some other federal government office. Social Security claims could ostensibly be accepted by lawyers on a non-contingent basis, but not likely at a rate of $75.00 per hour except for the inexperienced practitioner. A not unreasonable scenario that would develop, though, is the institution of a system similar to that used by some lawyers in criminal defense work, in which the client assigns an interest or lien in some valuable property (e.g., motor vehicle, residence) to the attorney. Such a system is absolutely unrealistic, however, because a large number of Social Security claimants have no property, no income, and no other resources to pay a non-contingent attorney fee. A claim for Social Security disability benefits requires a loss of earned income for at least five months, the pre-entitlement waiting period, and an expectation, at least, of inability to work for no less than twelve months. An SSI claimant will be disqualified for less than $2,000.00 in total resources, and it is incredibly ridiculous for the Secretary to offer hollow recommendations for charging non-contingent attorneys' fees to those individuals who have nothing.

The risk of contingent fee contracts falls entirely on the attorney, and such arrangements are a definite advantage to the individual claimants. Attorneys who practice in the area of Social Security claims generally provide financial resources to obtain documentation and expert medical opinions, either substantiating the client's case or clarifying the situation for the claimant to make alternative arrangements. In the "real world," the benefits of contingent fee contracts to claimants are substantial, and the risk to attorneys is one that all too often becomes a financial loss. Contingent fee contracts do not even assure reasonable compensation to attorneys, especially in claims for SSI only or concurrent Title II and Title XVI benefits. In the former case, all back-due benefits are paid directly to the claimant, notices are frequently not sent to the attorney advising of the payment, and no fees are paid by the client who spends the money for other purposes. In cases of concurrent entitlement, the SSA issues benefits backwards - SSI, from which no funds are withheld to pay attorneys fees, first and the primary Title II benefits, offset by the SSI already paid, second - resulting in actual receipt of a reduced fee regardless of the amount authorized from the overall benefits.

Contingent fee contracts permit access for nearly every Social Security claimant to qualified, experienced counsel. Limiting attorney fee approval to a formulaic process predicated effectively on any hourly rate, let alone one that is insufficient to compensate an expert or "specialist," will alter the availability of attorneys, harm the general population of Social Security claimants beyond repair, and create one more opportunity for the SSA to abuse what is supposed to be a remedial program. The present policies and procedures, recently implemented by the Secretary in response to a prefabricated non-issue, will not increase the value of benefits received by claimants, but will reduce the number of lawyers willing to accept at all cases involving Social Security claims. The end result may be that no claimant pays more than $75.00 per hour, though more claimants will pay nothing, as their claims are lost entirely for want of an advocate and resources to prove their case. The issue here is not whether claimants' attorneys are to be paid well - it is whether lawyers who have made it their business to fight for every sick or injured person asking assistance from the SSA will continue such work at all.

No claimant has ever been "overcharged" by an attorney that represented the individual before a Social Security ALJ and not complained. If the 36 year old man with a wife and child effectively paid $750.00 per hour to his lawyer, the $3,000.00 fee was an insignificant piece of the total value of the recovery to that family. The Secretary selectively reports what makes the attorneys' fee appear excessive, but conveniently omits any reference to the fact a lawyer required only four hours to convince an ALJ of the merits of a claim that had been denied twice before the SSA. The Secretary chooses not to consider that this 36 year old man, mentally disabled and likely so for the rest of his life, will continue to receive benefits from which no attorneys' fees are paid. The claimant in the illustration will very probably call his attorney on several subsequent occasions, asking for and receiving assistance or advice at no charge. The true value of the attorneys' services cannot be measured accurately as a percentage of retroactive benefits, but compensation can only be paid by that standard.

The Inspector General's specious comment notwithstanding, the practice of Social Security disability law is properly described as an "esoteric specialty," considering that it is a field generally "understood only by those few with pertinent interest or knowledge." *The Living Webster Encyclopedic Dictionary of the English Language* 335 (1st ed. 1971). In Arizona, for example, there are, by *liberal* estimate, no more than thirty lawyers representing Social Security disability claimants on a "regular" basis, and much fewer doing such work as a specific focus of a law practice. The entire active membership of the Arizona State Bar, however, numbers well over *7,000* lawyers. The few lawyers and law firms practicing more than occasionally before the Social Security Administration do so because of an abiding interest in performing a truly public service. These attorneys work constantly with the physically, mentally, and spiritually sick, injured, deprived and broken, people that inhabit the edges of a social structure never ventured into by Associate Commissioner Bradley or Secretary Bowen. The clients require a great deal more than representation, and they find not only someone to gather medical records but often also a rehabilitation counselor, a reference to medical or other care, a person who simply listens to them, all at no cost. The claimants have paid with their health and sanity, with the humiliation of insensitive treatment by Social Security employees, and with the loss of dignity derived from productivity and material comfort. They should not have to pay a lawyer to receive benefits for which they have contributed part of their lifelong wages, a frequent complaint, and it is not fair to them. It is a fact of the system, though, that money for an attorney is money well spent in matters involving the Social Security Administration.

The intangible, unrecorded services provided by such attorneys, and the continual efforts to maintain a practical knowledge of a legal field that is yet not completely formed, justify the percentage contingency fees that have become the custom. The time devoted to reading recent case law or basic medical texts for background, attending medical-legal seminars or workshops, is not reflected in the fee petitions. The efforts and consequent expertise, though, must be a factor in determining whether a particular fee is "reasonable" for an individual attorney in a particular case. The Secretary's data offers only a distorted picture of the whole situation, containing nothing more than a breakdown into irrelevant hourly fee rates. The important figures are how many fee petitions were for amounts exceeding $3,000.00 (only five percent of the total), and how many dollars of attorneys' fees were not paid by claimants because of the prior system and custom of limiting requests to the local authorization levels except in unusual cases.

The report of the Inspector General is premised on assumptions, leaps of illogic, and untenable statistical estimates. It is inconceivable that statistics from a sample of less than 2,000 fee petitions, approximately *two percent* of the 105,000 total annual fee requests, can be relied upon to change a procedure that substantively alters an administrative function. Five illustrations do not accurately typify the methods used by ALJs to analyze fee petitions, and seventeen ALJs in five local OHAs are not sufficiently representative of a population of hundreds of ALJs in 135 field offices. The fact that over 100,000 fee requests were filed in a one-year period, with no indication how many attorneys nationally filed all of those petitions, is meaningless and hardly demonstrates the availability of legal representation by the general population of lawyers. The Secretary's numbers, furthermore, by themselves provide no justification for disregarding geographic variations in local community practices concerning attorneys' fees.

Maintaining a legitimate law practice concentrating on Social Security claims requires a relatively large clientele when the average total fee, as reported by the SSA's Inspector General, is less than $1,100.00 per case. In the office of a regular Social Security claims attorney in Phoenix, petitions filed in about the first four months of 1987, and still pending, requested fees ranging from $390.70 for sixteen hours of work to $4,005.25 for 64.9 hours, $24.00 and $62.00 per hour, respectively. This office was able to provide effective services to many claimants, whatever their expected level of retroactive and monthly benefits, because the authorization process resulted in a full range of total fee awards from less than $325.00 to $3,000.00. The amount of time devoted to each case also varied from 19.4 hours ($330.70 fee approved) to 61.9 hours ($3,000.00 approved), yielding an average hourly rate of approximately $65.00. The attorney involved has been representing Social Security claimants for seventeen years and is a recognized expert in the field, receiving referrals from other lawyers in the entire state who are not only uncomfortable with Social Security cases but deliberately avoid such work.

The effect of the Secretary's new policy, whatever else may be intended, will be a diminution of the approval of attorneys' fees for greater than $1,500.00, and a diminished interest in accepting cases where after the client's benefit entitlement is established the argument will begin to obtain reasonable compensation for the attorney. Every minute of work will have to be explained and justified to someone who has no idea of the adjudicative process, from development of evidence through making the final decision. There is no objection to the recordkeeping responsibility imposed on attorneys, and obviously excessive representations should not be condoned. It is equally short-sighted, however, to approve $3,000.00 for forty hours of work by a new lawyer ($75.00 per hour) when a more experienced attorney achieves the same result in only twenty hours and is paid half the fee. The previous process ensured that the latter individual was compensated for the benefits obtained by the client, at no loss to the attorney because he or she was a highly qualified expert. The same assurances are noticeably absent from the present vindictive and irrational proposal.

Under the $3,000.00 local OHA fee authorization limit, only the relatively low fees were approved "perfunctorily," though compatible with the expectations of the claimant and attorney who had agreed on the usual twenty-five percent contingency fee. The fee amount was rarely determined by "happenstance" and the Inspector General's report is, in that respect, contrary to reality. It is true that a higher dollar fee will be available, although not always asked for under the old procedure, if the claimant's back-due benefits are relatively high. It is not true, however, that there is no correlation between the effort demanded of an attorney in such cases and that necessary for claims generating lower fees. Larger retroactive benefits will be due when the claim is either for a longer period of time or involves an individual with a good earnings history.

In the former situation, evidentiary difficulties abound. There may be scanty documentation of the existence of a disease or injury, and little or no evidence of impairment to prove a "disability." The skills, time, and attention needed to win the case will obviously be more extensive than for a claim going back a short period of time with adequate verification. No one factor is properly more significant than any other, but an appropriate impression should be that the attorney has earned and is entitled to a substantial fee. The other situation is one in which the claimant may have been employed in a highly skilled, well-paying occupation, and/or is relatively young so there has been no dilution of the benefit amount from early low-wage years. These cases are more difficult to prove because it is generally easier for the SSA to show there are alternative jobs within the claimant's overall capabilities, as medical-vocational elements of the disability evaluation are less favorable for individuals under the age of 50 years.

There is no "typical" Social Security disability case and no perfect method for approving attorneys' fees, a function delegated to the Secretary by law. The procedure and policy in effect until March 31, 1987 did work; none of the Inspector General's suggestions are reasonable, and the irresponsible implementation of substantive changes by Associate Commissioner Bradley will not protect claimants. Attorneys have accepted that some cases will generate only a few hundred dollars in fees, understanding that over a period of time the law of averages would tend to balance it all. No one client "subsidizes" the services provided to others, but everyone with a case determined by a lawyer to have merit does have access to the best representation regardless of ability to pay a minimum level of compensation.

Attorneys have accepted that no particular fee is "unreasonably low," and self-limitations, pursuant to local ALJ authority, have rendered the concepts of "low" or "high" fees immaterial. The Secretary's suggestion that "low" fees be adjusted upward somehow is particularly facile, as there is no source except the claimant's retroactive benefits and payment of more than the statutorily withheld twenty-five percent is unrealistic. The claimants simply do not have the resources. The changes made and/or recommended will not improve availability of experienced attorneys to handle Social Security cases, and the attorneys currently performing the work have no misconceptions that the Secretary's hidden agenda is anything other than discouraging attorney participation in the disability determination process.

IV. CONCLUSION

The contingent attorney fee system worked effectively to provide attorneys for any claimant with a legitimate case who wanted legal assistance. Those who took advantage of representation had no major complaints about the amount of fees authorized by ALJs, and if they did there was a viable procedure for protest. The Secretary's self-righteous interest in protecting claimants from attorneys is no more than a transparent attempt to discourage lawyers from maintaining a regular Social Security disability practice. Lawyers have made life at the SSA very difficult in the past few years, by forcing the agency to operate within Congressionally and judicially mandated processes. Petty administrative politics have eroded, and continue to disrupt, what could be an efficient, effective administrative adjudicative function.

Discouraging attorneys from maintaining a presence in the system will further interfere with claim determinations, as tasks now performed by lawyers, such as obtaining material and relevant evidence, will become the ALJ's responsibility. When current data shows that ALJs nationally have a backlog of over 200 cases, reducing attorney participation will simply increase the overload and render an already time-consuming, delay-intrinsic system even less useful to those who need help the most - the sick, the unhealthy, the disabled.

The acceptable alternative attorney fee arrangements necessarily involve contingent agreements, and are generally limited to a presumptively reasonable fee of twenty-five percent of retroactive benefits with a maximum dollar value set sufficiently high, in the $3,000.00 to $4,000.00 range. No hourly rate should be a factor in attorney fee authorizations, and the presumption that twenty-five percent of back-due benefits is reasonable should be rebuttable only by valid objection of the claimant or if the dollar amount exceeded a set maximum. In such circumstances, or if the attorney chose to submit another request, the ALJ who decided the case would also determine the fee, with appeal to the Regional Chief ALJ if desired. The present policy and procedures implemented by administrative fiat as of March 31, 1987 do not comport with applicable rule-making criteria enumerated in the Administrative Procedures Act. The actions of Associate Commissioner Bradley are unlawful, unjustifiable, and ineffective for the stated purposes. The end result will be a denial of claimants' rights to legal counsel because of the unavailability of qualified attorneys.

The Subcommittee on Social Security, Committee on Ways and Means, of the United States House of Representatives, is to be commended for its interest in the daily business of the SSA. It is hoped that this testimony will provide the members with sufficient information to resolve any questions that have been raised in the matter of agency authorization of attorneys' fees in Social Security disability cases, and to protect the identifiable interests of all potential claimants for Social Security benefits. Your indulgence, patience, and attention have been greatly appreciated, and we look forward to improvements in the system from your efforts. Thank you.

Joel F Friedman

JOEL F FRIEDMAN, ESQUIRE
For Greater Phoenix Disability
Counsel Association
Mark R. Caldwell
Richard A. Gibson
Rodney A. Melkonoff
Edward M. Ober
Steven D. Slepian
Patricia Jerome Stewart
Alan M. Schiffman

cc: ALJ's
MR

DEPARTMENT OF HEALTH AND HUMAN SERVICES

MEMORANDUM
SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals
Region IX

SG-F9/SI-4-15
87:05:22

DATE: May 26, 1987

FROM: Stanley S. Sadur
Regional Chief Administrative Law Judge
OHA, Region IX

SUBJECT: Misapplication of the Revised Delegation of Authority to Approve Representative's Fees - ACTION

TO: All Administrative Law Judges

Enclosed are memorandums dated May 12, 1987 and May 15, 1987, from the Associate Commissioner and the Acting Chief Administrative Law Judge, respectively, concerning the above stated subject.

I believe that the information contained in these memorandums are self explanatory. I am certain that you will accurately follow these instructions.

Stanley S. Sadur
Stanley S. Sadur

Attachments: 3 Pages

Reg 9

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:
SGJ

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

MAY 15 1987

MEMORANDUM TO: Regional Chief Administrative Law Judges

FROM : Acting Chief Administrative Law Judge

SUBJECT : Misapplication of the Revised Delegation of Authority to Approve Fees--ACTION

This memorandum confirms our telephone conversation on May 12, 1987.

A review of Administrative Law Judge fee authorizations issued since March 31, 1987, has revealed a number of instances related to a misapplication or misinterpretation of the revised delegation of authority.

Thus far, three problems have been identified, namely:

1) Some ALJs have approved fees in excess of $1,500 after the revised delegation was in effect -- Many of the fee petitions approved were in all probability, "in the pipeline" at the time the notice of revision was issued. I request however, that you ensure the ALJs in your region are aware of, and adhere to, the revised delegation.

2) In some cases where the petition was for more than $1500, some ALJs have set fees for less than that requested without explaining why. The change in the delegation of authority is not, by itself, cause for reducing fee requests. All petitions must still be evaluated by current criteria and, depending on the evaluation, an order issued or a recommendation made to the RCALJ. In cases where the fee is reduced, adequate expanation must be given on the order itself.

3) Some ALJs have been including incomplete or erroneous statements of current policy in fee authorizations -- I have attached copies of fee authorizations from your region containing such statements. Please contact every

ALJ whose fee authorization is attached and ensure that the March 31, 1987 memorandum communicating the revised delegation of authority is clearly understood and followed.

for James R. Rucker, Jr.

Attachment

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to:

Office of Hearings and Appeals
PO Box 3200
Arlington VA 22203

MAY 12 1987

MEMORANDUM TO: Acting Chief Administrative Law Judge

FROM: Associate Commissioner

SUBJECT: Misapplication of the Revised Delegation of Authority to Approve Fees--ACTION

Staff in the Office of Appraisal are collecting data on fee authorizations in the hearing offices. In the course of their review of Administrative Law Judge fee authorizations issued since my March 31, 1987 memorandum, they have identified a number of instances where ALJs are misapplying or misinterpreting the revised delegation of authority.

Attached are two listings. The first identifies those ALJs who have approved fees in excess of $1500 after the revised delegation was in effect. While some of these authorizations may have been "in the pipeline" at the time of my March 31 memorandum, please ensure that these ALJs are aware of, and adhere to, the revised delegation.

The second list identifies ALJs who have authorized a fee of $1500, but have failed to provide the representative with an explanation of their action. While representatives can always request administrative review by the Regional Chief Judge, whenever a fee request exceeds $1500 and an ALJ proposes to approve an amount below $1500, the authorization should explicitly state that the ALJ does not recommend a fee in excess of $1500. Please communicate this requirement to all ALJs.

Finally, attached are copies of fee authorizations which include erroneous or incomplete statements of current policy. Please have the Regional Chief ALJ in the appropriate region contact every ALJ whose fee authorization is attached and ensure that my March 31 memorandum is clearly understood and followed.

Eileen Bradley

Chairman JACOBS. Mr. Gorey.

STATEMENT OF STEPHEN GOREY, ESQ., SAN DIEGO, CA

Mr. GOREY. Thank you. Mr. Chairman, members of this committee, I would like to start off by referring you to the penalty provisions of the act you were asking about.

Chairman JACOBS. We have that cleared up, sir.

Mr. GOREY. I practice primarily in San Diego. We have over 1 million people in San Diego. We have 1,300,000 in the metropolitan area. We have 2 million in the county. We have 7,500 attorneys. Only six of us will handle Social Security cases. Of those six one has recently said he is getting out. He has had enough.

There is a good reason for this low number of attorneys. And it is tied directly to the fee setting provisions of the Social Security Administration.

Mr. Freidman covered a number of points which I will not go over with you. And I am going to try to keep my remarks brief. I have only written three and a half pages but I have quite a thick submission. The reason for the submission being so thick is that I have submitted copies of fee petitions along with my hours in cases for which I have often been compensated at a rate of anywhere from $18 to $30 an hour.

Chairman JACOBS. That might be of interest to the committee. With your permission we will insert that in the record.

Mr. GOREY. Thank you very much. I appreciate that.

I would like to go back very briefly to the original intent of the fee-setting provisions of the Social Security Act, which you are quite familiar with, where there were some problems with attorneys requesting contingency fees of 33⅓ percent to 50 percent in Social Security cases. That is when Congress decided to act and set 25 percent as the limit.

Cases that have come along since then, interpreting that legislative history in Public Law 89-97 and in H.R. 6675, hold there was a dual purpose here. We wanted to make sure that attorneys were limited. We only want to give them 25 percent. At the same time we want to encourage attorneys to practice in the field so we are going to have direct payment to them.

However, the administration in enforcing this legislation set up seven factors to be considered, one of which is the hourly rate. And that is the one that they have since worked on.

Other speakers before this committee have testified about the problems when you have a $75 per hour, or any type of hourly rate, and how that gets reduced when you do not win a certain number of cases.

I want to bring up one further point along this line, which is the fact that [illegible] of us are becoming computerized now. And I posed this question to the Social Security Administration, what happens if our hours go down because we have computers? Well, the response that I got and that is contained in my submission from the administration says, well, usually more efficiency will not result in a lower fee, however, the hours that you spend is one of the considerations we have to consider, leaving the door quite open to them to cut our fees down should we become more efficient if we are going to go on an hourly rate.

I have calculated the loss to the program in terms of dollars and cents in my outline of ALJ's and their staff having to process these fee petitions. As it turns out from Ms. Bradley's testimony of fee petitions actually processed, my figures are low.

I calculated $2 million at the ALJ level. That figure would have to be revised upwards to $3 million in terms of manpower, considering what the ALJs are paid and what the GS–5s are paid for working on these things.

This is a pure loss to the administration in having to administrate this program just at the ALJ level, not considering the district level and not considering the regional level.

It also does not actually take into account the additional time lost to claimants when an administrative law judge is taking months to process his decision simply because he is spending more time doing fee petitions.

I would like to address some of the things that were brought up by Eileen Bradley before I make my conclusion.

Eileen Bradley mentioned the fact that one of the purposes is to protect the economic status of the claimant. Now I have seen this language appear when I handled people with SSI claims, supplemental security income claimants. I am one of the few attorneys who will do that. I oftentimes get a fee reduction stating that we have to protect the economic status of the claimants, and instead of paying me say $70 or $80 or $90 an hour, I will get a fee authorization for $35 or $40 an hour.

Now, this protects the economic status of the claimant in that particular claim on the retroactive benefits, but that claimant might have $180,000, $200,000 coming to them over the life of their claim and I have been paid maybe $500 or $600 on a claim on which I myself might have put out at risk $500 or $600 in medical exams, report, et cetera.

So when she says she wants to protect the economic status of the claimant, that is just tricky wording as far as I am concerned for another way to cut down the amount that we are going to be paid.

This loadstar approach, reasonable hours for a case, I have seen that language too. I have administrative law judges say you spent 9 hours on this claim, I did not see anything particularly fancy about it, I think that that is too many hours, I am going to cut down your fee. My response has always been how many of these cases did you handle?

I had an administrative law judge approach me once when I was photocopying a claimant's file at the Office of Hearings and Appeals. He said, "Why do you copy all those records? When I did this practice we just copied the consultative exam. You are taking too much time, and that is why your fee petitions are so heavy on time." I said, "No, in order to represent this claimant, I have to look through all the records to see what various doctors said."

This loadstar approach will do nothing but allow the administration to set what they consider to be a reasonable amount of time and it will result in attorneys cutting down the amount of time that they are willing to spend on the client when they have a complicated case.

I have also seen an immediate reduction in my fee authorizations. Due to the amount of time it takes a case to come up and the amount of time of the average claim, and we get a lot in the realm of $1,500 to $1,800 as the normal fee authorization. I have seen the number being cut down to $1,500.

I would like to make a proposal to this body. Any solution should address several areas. It should provide a measure of protection to disability recipients, it should encourage attorneys to practice in this field, it should provide uniformity and predictability of fees, and it should lead the administration out of this bureaucratic entanglement.

These objectives could most easily be met by setting 25 percent of the unreduced disability and SSI retroactive benefits as the maximum an attorney could charge and making all fees contingent on an award of benefits. Have the retroactive disability and SSI checks made out jointly to the claimant and the attorney. If a claimant has a fee grievance, every State bar has a grievance system which costs nothing to the taxpayer.

This proposal would entirely eliminate the bureaucratic fee setting process while implementing the original congressional intent.

I would only ask that one thing be considered, and that is that SSI be included in this process. In SSI, those fees are not withheld. Very few attorneys other than myself will handle them.

I want to thank you for your time and allowing me to make this presentation. Thank you.

[The prepared statement and attachments follow:]

Hearings Before the House of Representatives
Ways and Means Committee

Subcommittee on Social Security

Held May 13, 1987

The original intent of Congress in amending the attorney fee regulations in 1968 under 42 U.S.C. 406 has been undermined and thwarted by the actual fee-setting regulations subsequently adopted by the Secretary of Health and Human Services.

Federal Courts have considered the legislative history of P.L. 89-97 and H.R. 6675 which resulted in the present wording of 42 U.S.C. 406 and have specifically found:

> "In enacting 42 U.S.C. 406, Congress intended to encourage lawyers to represent disability claimants." McKenzie v. Heckler, 602 F.Supp. 1150, 1152 (D. Minn. 1985), Motley v. Heckler, 605 F.Supp. 88 (W.D. Vir. 1985).

42 U.S.C. 406 was designed to protect claimants from 33-1/3% to 50% contingency fee agreements by limiting attorneys to 25% of the retroactive benefits. See Dawson v. Finch, 425 F.2d 1192 (CA 5 1970).

However, in enforcing this statute the Administration drafted seven factors to be considered. These factors are: (1) the services performed; (2) the complexity of the case; (3) the level of skill and competence required; (4) the time spent on the case; (5) the results achieved; (6) the level of review to which the claim was eventually taken; (7) the amount requested. See 20 C.F.R. 404.1720.

While these factors look acceptable on paper, in actual practice they are often abused.

In Exhibit A(1), 25% of the retroactive benefits was $1,512.75. 16.25 hours were spent on the claim, but the authorization was slashed to $404.00.

In Exhibit A(2), 25% of the retroactive benefits was $992.25. 32.25 hours were expended, yet the ALJ cut the fee to $750.00.

In Exhibit A(3), 25% of the retroactive benefits was $1,000.00. 6.25 hours were expended but the ALJ cut the fee to $100.

It is no answer to such abuse to say that a dissatisfied attorney can appeal to the Regional Chief Judge.

As seen for example, in Exhibit B, fee authorizations which were unreasonably low are often not raised by the Regional Chief ALJ (RCALJ).

There is no appeal from a fee decision by an RCALJ.

Even if the system of seven factors set up by the Administration as considerations in arriving at a fee were uniformly and fairly enforced, the system would still not accomplish Congress's goal of encouraging attorneys to practice in this field.

The reason for this is that as long as the "hourly" standard is included, an attorney will not be adequately reimbursed.

Why is this? The obvious answer is that only a successful attorney is going to be paid. There are no retroactive benefits if you lose, nor would an unsuccessful claimant be in the financial position to pay a straight hourly rate.

In practical terms, assuming an attorney wins 70% of his claims, $100-an-hour authorizations are reduced to $70 an hour in real terms over the year.

Compounding this problem is the fact that Social Security Disability and Supplemental Security Income claims are "high overhead" claims. Usually, clients cannot afford the costs of medical records and reports. These costs must be borne by the attorney and hopefully recovered if the claim is successful. In many claims the attorney will have to put up cash for actual medical examinations and X-rays, tests, etc. This is necessary where an indigent person has not sought medical attention, or else gets medical attention at a clinic where the doctors do not have the time to do reports. If you lose these claims, you lose your costs. It is very rare for an unsuccessful claimant to be in a position to repay you. The $70 an hour thus becomes $60.

The hourly figure read into regulations does not figure an attorney's overhead. While the Administration states that overhead must be recouped when you decide how much to charge, Exhibit C, in fact there is no provision that allows the ALJ to consider the high overhead inevitable in a major urban area.

The present fee setting structure discourages efficient attorneys. Please note the Administration's position in Exhibit D. If an attorney obtains a computer and his time diminishes on a claim, should he be penalized? The enclosed letter from a former commissioner dated 2/13/84, Exhibit D, indicates that he might.

There are a number of further problems inherent in the present fee structure.

The process itself is often lengthy and cumbersome. For example, in Exhibit E(1), we submitted a fee petition on 6/24/85. It was finally authorized on 4/15/87.

In Exhibit E(2), we submitted a fee petition on 6/4/85. It has not yet been acted on.

Even the withholding provision often does not work, resulting in further delays.

For example, in Exhibit F, our fee of $1,088.50 was accidentally released to our client. It took over a year before the Administration paid us.

Attorneys' fees are further reduced due to certain other debts or offsets the claimant may have. In any other field of law, the attorney is paid before doctors and other creditors. But in Social Security claims the retroactive pay may be reduced by the amount of prior overpayments, State disability, or Workmen's Compensation.

Finally, this program is costly to the taxpayers of our Country. An average ALJ will process approximately 150 fee petitions a year. In order to apply all seven mandated factors at arriving at a fee, he will have to spend .25 hours per petition, or 37.5 hours in a year. There are roughly 600 ALJ's in the Social Security system, representing a total of 22,500 man-hours per year for this system at the ALJ level. At a starting salary of $30 an hour for a GS-15, $675,000 is lost as salary to implement this system. To this must be added approximately .5 hours per petition for clerical staff at the GS-5 rate of $6.00 an hour, for a total of approximately $270,000. When you add the costs of fee authorizing at the District level, the Appeals Council level, and the judicial level, the cost probably doubles, to approximately $2,000,000.

Compounding the monetary loss to the Administration, is the loss of time to the attorney in preparing the fee petition, sending out letters to obtain costs, tracking down fees which are delayed, etc.

Any solution should address several areas. It should provide a measure of protection to disability recipients, it should encourage attorneys to practice in this field, it should provide uniformity and predictability of fees, it should relieve the Administration of this bureaucratic entanglement.

These objectives could most easily be met by setting 25% of the unreduced disability and SSI retroactive benefits as the maximum an attorney could charge, and making all fees contingent upon an award of benefits. Have the retroactive disability and SSI checks made out jointly to the claimant and attorney.

If a claimant has a fee grievance, every State Bar has a grievance procedure which costs nothing to the taxpayer.

This proposal would entirely eliminate the bureaucratic fee setting process, while implementing the original Congressional intent.

Respectfully submitted,

STEPHEN GOREY, Attorney at Law
401 W. "A" Street-Ste. 205
San Diego, CA 92101

EXHIBIT A(1)
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

To (Name and Address of Representative)

Stephen Gorey, Attorney
401 W. "A" St., Ste. 205
San Diego, CA 92101

Loretta Ward
(Claimant)

(Wage Earner) (Leave blank if same as above.)

(Social Security Number)

SSDC
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 404.00 for your services rendered before the Social Security Administration

NOTE: *IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED* an administrative review may be requested by sending a letter within *30 days* to:

Regional Chief Adm. Law Judge
100 Van Ness Ave.
24th Floor
San Francisco, CA 94102

(See reverse side for additional details.)

The paragraph(s) checked below refer to payment of your authorized fee:

☒ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to Office of Disability Operations, Module 33, 1500 Woodlawn Drive, Baltimore, MD 21241

☒ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney, or (3) the claim is for supplemental security income.

☒ The authorized fee herein is for all legal services rendered to the claimant (and his/her family) under the Social Security Act.

AUTHORIZING OFFICIAL:

Albert Tom
(Signature)
Albert Tom
(Typed Name)
Administrative Law Judge
(Title)
April 15, 1987
(Date)

cc: (Name and Address of Claimant)

Loretta Ward
3211 K St.
San Diego, CA 92102

REPRESENTATIVE

SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (6/85)
Prior editions may be used

EXHIBIT A(1)
Page 2

A-5 T

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

TOE 410

Form Approved
OMB No. 0960-010

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

PLEASE NOTE INFORMATION ON THE REVERSE

PAPERWORK/PRIVACY ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of → Fee $ 1,512.75

for services performed as the representative of → MR MRS MS LORETTA WARD

in a claim or proceeding before the Social Security Administration

Type of Claim(s): Title II, Title XVI

Enter the name and address of the person on whose Social Security record claim is based:

Loretta Ward
3211 K Street
San Diego, CA 92102

Enter the Social Security number of person on whose record claim is based: -/ -/

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1. My services as a representative → Began (month, day, year) 1/24/85 Ended (month, day, year) 12/29/86

2. Itemization of services rendered before the Social Security Administration

DATE (mo., day, yr.)	(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)	ACTUAL TIME SPENT
	See attached breakdown	
	If more space is needed, attach separate sheet **TOTAL HOURS**	16.75

3. Have you and your client entered into a fee agreement for services before SSA? ☒ YES ☐ NO
(If "Yes," please specify the amount (or the agreed-upon formula).) $ 25% retroactive

4. Have you received, or do you expect to receive any payment toward your fee from funds held in an escrow or trust account, or ~~from any other~~ source? *(If "Yes," please specify the amount.)* ☒ YES ☐ NO
$ 500

5. Have you received, or do you expect to receive reimbursement for expenses you incurred? *(If "Yes," please itemize):* ☒ YES ☐ NO

University Hospital - records	$31.10
Physicians and Surgeons Hospital - records	$15.00

6. Did you render any services relating to this matter before any State or Federal Court? ☐ YES ☒ NO
(If "Yes," what fee did you or will you charge for services in connection with the court proceeding?) $

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative: Stephen Corey
STEPHEN COREY

Date: 2/12/87

Address:
401 W. "A" Street-Ste. 205
San Diego, CA 92101

Firm with which associated, if any: Stephen Corey

Telephone No. and Area Code: 619 239 6711

FORM SSA-1560-U4 (3-83)
Destroy prior editions

REPRESENTATIVE'S COPY

EXHIBIT A(1)
Page 3

REQUEST FOR APPROVAL OF A FEE FOR REPRESENTING LORETTA WARD BEFORE THE SOCIAL SECURITY ADMINISTRATION

Date	Description	Hours
1/24/85	Intial telephone.	0.0
1/30	Initial interview.	1.00
2/2	Processed request for hearing and supplemental forms to SSA.	.25
2/5	Request records from following sources: Gifford Clinic, University Hospital, Physicians and Surgeons Hopital.	.25
2/6	Receive acknowledged copy of hearing request. Verify timely filing.	.25
2/11	Receive letter from SSA local office.	.25
2/12	Letter to client with additional form requested by SSA.	.25
2/13	Receive and review University Hospital records.	.25
2/15	Receive form back from client. Review.	.25
2/20	Call from client re: SSA form with additional information.	.25
2/21	Process SSA form 8200 to SSA.	.25
2/25	Receive and review records from Physicians and Surgeons Hospital.	.25
2/26	Receive and review Gifford records.	.25
6/18	Letter to client.	.25
6/28	Photocopy file at OHA. Return to office and review.	.75
7/1	Submit evidence to ALJ.	.25
7/29	Call from client.	.25
7/29	Call to Gifford.	.25
7/30	Call to Gifford.	.25
7/30	Call to Gifford. Left message requesting 1985 records.	.25
8/6	Submit evidence to ALJ.	.25
8/8	Call to client re:hearing.	.25
8/9	Prehearing conference with client. Wait for ALJ. He is in another hearing.	1.25
8/12	Call from OHA to re-set hearing .	.25
8/12	CAll to client.	.25
8/13	Receive Notice of Hearing. Verify date and time with file and calendars.	.25
8/18	Call to client.	.25
8/19	Prehearing conference with client.	.50
8/19	Hearing.	2.00
9/25	Call from client for status. Explained Moratorium	.25
9/25	CAll to OHA.	.25
11/25	Receive option letter. Reciew file.	.25
11/25	Call to client. Phone is disconnected.	.25
11/26	Letter to client re: option.	.25
11/27	Call from client.	.25
11/27	Submit option form to OHA.	.25
11/27	Letter to client.	.25
12/9	Receive remand order.	.25

EXHIBIT A(1)
Page 4

12/9	Call from client for status.	.25
1/30/86	Call to OHA. File sent back 12/6/86	.25
2/6	Letter to SSA.	.25
2/6	Letter to Department of Social Services.	.25
3/18	Receive and review letter from Gifford.	.25
3/18	Submit evidence to Department of Social Services.	.25
5/10	File check.	.25
5/14	Call to SSA East San Diego. File at Front St.	.25
5/14	Call to SSA Front Street cannot find file.	.25
6/26	Receive and review award certificate.	.25
10/29	Letter to client.	.25
11/6	Call from client. Received over $6,000 in SSI retro.	.25
12/29	Letter to client.	.25
	TOTAL HOURS	16.75

EXHIBIT A(2)
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

To: Name and Address of Representative

Stephen Gorey
Attorney at Law
401 W. "A" Street, Ste. 205
San Diego, CA 92101

Date: April 15, 1987

In the case of
Julie Day
(Claimant)

(Wage Earner) (Leave Blank if same as above.)

(Social Security Number)

SSDC
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 750.00 for your services rendered before the Social Security Administration.

NOTE: *IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED*, an administrative review may be requested by sending a letter within *30 days* to:

Regional Chief Admin. Law Judge
100 Van Ness Avenue
24th Floor
San Francisco, CA 94102

(See reverse side for additional details.)

The paragraph or paragraphs checked below refer to payment of your authorized fee:

☒ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to Western Program Service Center, Attn: Reconsideration Review Section, P.O. Box 2152, Richmond, CA 94802

☐ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney, or (3) the claim is for supplemental security income.

☒ The authorized fee is for all legal services rendered to the claimant and (his/her family) under the Social Security Act.

AUTHORIZING OFFICIAL:

(Signature)
ALBERT TOM
(Typed Name)
Administrative Law Judge
(Title)

cc Name and Address of Claimant
Julie Day
4514 Bancroft Street, #13
San Diego, CA 92116

REPRESENTATIVE SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (8-83)
Prior editions may be used

EXHIBIT A(2)
Page 2

RECEIVED
DEC 19 1986
OHA S.D.
REGION

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

ALJ TOM

OMB No. 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

NOTE INFORMATION ON THE REVERSE

PAPERWORK ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of → Fee $ 992.25

for services performed as the representative of → MR MRS MS JULIL DAY

in a claim or proceeding before the Social Security Administration — Type of Claim(s): Title II, Title XVI

Enter the name and address of the person on whose Social Security record claim is based:

Julie Day
4514 Bancroft St. #13
San Diego, CA 92116

Enter the Social Security number of person on whose record claim is based: — — — / — — / — — — —

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1 My services as a representative → Began (month, day, year) 9/10/84 — Ended (month, day, year) 12/18/86

2 Itemization of services rendered before the Social Security Administration

DATE (mo. day, yr.)	(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)	ACTUAL TIME SPENT
	See attached breakdown	
	If more space is needed, attach separate sheet — **TOTAL HOURS**	32.25

3 Have you and your client entered into a fee agreement for services before SSA? *(If "Yes," please specify the amount (or the agreed-upon formula).)* 25% retroactive ☒ YES ☐ NO $

4 Have you received, or do you expect to receive, any payment toward your fee from funds held in an escrow or trust account, or from any other source? *(If "Yes," please specify the amount.)* ☐ YES ☐ NO $

5 Have you [✓ received] or do you expect to receive, reimbursement for expenses you incurred? *(If "Yes," please itemize)* ☒ YES ☐ NO

Dr. Buchanan - report	$75.00
Mid-City Clinic, University Hospital - records	$45.81
Physicians and Surgeons Hospital - records.	$24.30

6 Did you render any services relating to this matter before any State or Federal Court? *(If "Yes," what fee did you or will you charge for services in connection with the court proceeding?)* ☐ YES ☒ NO $

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative: Stephen Gorey
STEPHEN GOREY
Firm with which associated, if any

Date: 12/19/86

Address:
401 W. "A" Street-Ste. 205
San Diego, CA 92101

Telephone No. and Area Code

EXHIBIT A(2)
Page 3

REQUEST FOR APPROVAL OF A FEE FOR REPRESENTING JULIE DAY BEFORE THE SOCIAL SECURITY ADMINISTRATION

Date	Description	Hours
9/10/84	Initial telephone consultation.	0.0
9/14/84	Initial interview. Complete reconsideration questionnaires.	1.25
9/14/84	Processed Request for Reconsideration, Appointment of Representative and supplemental forms to SSDO.	.25
9/26/84	Receive and review notice and letter from SSDO.	.25
10/19/84	Call from client re: status. Advised SSI denied.	.25
10/24/84	Receive and review denial. Letter to client with instructions and forms for appeal.	.25
10/29/84	Call from client. Will complete forms ASAP.	.25
11/7/84	File review. Forms not in yet. Reminder to client.	.25
11/13/84	Call from client re: forms.	.25
11/16/84	Receive and review forms from client. Process Request for Hearing and supplemental forms to SSDO. Notarized statement from client included.	.25
11/28/84	Acknowledged copy of Request for Hearing received. Check for timely acceptance.	.25
12/2/84	File review.	.25
12/4/84	Letter to client with special authorization required by Physicians and Surgeons Hospital.	.25
12/4/84	Request records from Mid-City Clinic.	.25
12/4/84	Request records from Gifford Clinic.	.25
12/10/84	Receive and review Mid-City Clinic records.	.25
12/12/84	Send authorization to Physicians and Surgeons Hospital for records.	.25
1/2/85	Receive and review records from Physicians and Surgeons Hospital.	.25
1/3/85	File review. Client should see psychologist.	.25
1/8/85	Call from OHA to schedule hearing. Check calendar for available date. Mark calendars and file.	.25
1/8/85	Receive and review records from Gifford Clinic.	.25
1/8/85	Call to client. No answer.	.25
1/9/85	Call to client. Left message. Need to discuss psychological testing.	.25
1/9/85	Call from client. Will continue with Gifford and seek psychological referral.	.25
1/10/85	Photocopy file at OHA. Return to office and review.	.75
1/11/85	Call to client. Left message.	.25
1/11/85	Call from client. Seeing psychiatrist at Gifford. Will try to see psychologist. E.R. visit this morning.	.25
1/21/85	Call from OHA. Hearing must be rescheduled. Checked calendar for available date. Marked calendars and file.	.25
1/23/85	Call to client to remind of hearing. No answer. Mailed copy of Notice of Hearing.	.25
1/28/85	Call from client. She will be seeing Dr. Farjalla, psychologist, and will continue to see for treatment.	.25
1/29/85	Request report from Dr. Farjalla.	.25
2/3/85	Call from client.	.25

EXHIBIT A(2)
Page 4

2/21/85	Call from client for status.	.25
3/6/85	Request medical records from CMH.	.25
3/11/85	Call from CMH. Records are ready.	.25
3/11/85	Drive to CMH to pick up records.	.5
3/11/85	Call from client re: hearing.	.25
3/12/85	Pre-hearing conference with client.	.5
3/12/85	Hearing.	1.0
3/14/85	Request records update from Gifford Clinic.	.25
3/20/85	Call from Dr. Farjalia. Will send 1984 records.	.25
3/29/85	Receive and review decision.	.25
4/1/85	Call from client. Advised we will appeal decision.	.25
4/2/85	Request report from Dr. Buchanan. Records and copy of decision included.	.25
4/3/85	Request records from University Hospital.	.25
4/8/85	Receive and review University Hospital records.	.25
4/12/85	Call from client. She is being seen at Gifford again.	.25
4/19/85	Call from client for status.	.25
4/24/85	Receive and review letter from Dr. Buchanan.	.25
5/6/85	Request report from Dr. Fayaila.	.25
5/17/85	Call to Dr. Farjalla. Left message.	.25
5/21/85	Call to Dr. Farjalla. Left message.	.25
5/21/85	Call from Dr. Farjalla. He can't write a report.	.25
5/21/85	Request for Review, memo and evidence to Appeals Council.	.25
6/10/85	Call from client for status.	.25
7/22/85	Call from client for status. She's having a "nervous attack" and will go to Mid-City Clinic.	.25
8/26/85	Receive remand order.	.25
8/26/85	Call to client. Phone is disconnected.	.25
8/26/85	Letter to client re: remand. Advised her to resume treatment at Gifford.	.25
8/27/85	Call from client.	.25
9/11/85	Call from client with new address.	.25
9/30/85	Letter to client.	.25
10/2/85	Letter to client.	.25
10/3/85	Call from client.	.25
10/10/85	Call from client for status.	.25
11/13/85	Receive and review option letter.	.25
11/13/85	Call to client re: option letter.	.25
12/4/85	Call from client for status.	.25
12/31/85	Receive CE letter.	.25
1/2/86	Send copy of CE letter to client.	.25
1/17/86	Letter to client.	
1/17/86	Call from OHA. CE's to be postponed.	.25
1/17/86	Letter to client to advise CE's postponed. Client's # is disconnected.	.25
1/22/86	Call from OHA for client's current address.	.25
1/27/86	Letter to client.	.25
1/31/86	Call from client.	.25
1/31/86	Call to OHA. Left message.	.25
1/31/86	Call from OHA. Furnished client's current address.	.25
2/18/86	Call from Disability Analyst to reschedule CE.	.25
2/18/86	Call to client. No answer.	.25
2/24/86	Call from client. Got CE notice.	.25
2/26/86	Call from Disability Analyst to remind of CE.	.25

EXHIBIT A(2)
Page 5

3/21/86	Letter from OHA requesting clarification on source of medical information.	.25
3/24/86	Letter to OHA re: medical source.	.25
4/7/86	Call from client.	.25
4/7/86	Call to Disability Analyst.	.25
4/7/86	Call to OHA. Psych appointment to be rescheduled.	.25
4/7/86	Call to client.	.25
4/18/86	Receive notice of CE.	.25
4/22/86	Call from Disability Analyst to remind of CE.	.25
4/23/86	Call from client.	.25
4/28/86	Call from client.	.25
6/18/86	Call from client for status.	.25
6/24/86	Call from OHA. Hearing to be first week of August.	.25
7/1/86	Call from client for status.	.25
7/9/86	Call from OHA to schedule hearing. Check calendar for available date. Mark calendars and file.	.25
7/11/86	Received Notice of Hearing. Copy sent to cleint.	.25
7/22/86	Call to client for medical update. Left message.	.25
7/24/86	Call to client.	.25
7/24/86	Photocopy file at OHA. Return to office and review.	.5
8/5/86	Call to client re: hearing.	.25
8/6/86	Pre-hearing conference with client.	.25
8/6/86	Hearing with medical advisor and vocational expert. Submit evidence.	1.5
8/23/86	Receive and review partially favorable decision.	.25
9/10/86	Call from client.	.25
10/7/86	Call from client. She's moving and will call back with new address.	.25
10/11/86	Call from client.	.25
10/16/86	Call to District Office. They will check status.	.25
10/17/86	Receive and review award certificate.	.25
10/21/86	Call to District Office. They will have client come in to review information for SSI.	.25
10/21/86	Call to client. Left message.	.25
10/22/86	Call from client. She will keep appointment at Front Street Social Security office.	.25
11/13/86	Call from client re: status of SSI benefits.	.25
12/18/86	Call from client.	.25
	TOTAL HOURS	32.25

EXHIBIT A(3)
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

To (Name and Address of Representative)

Stephen Gorey
401 W. "A" St., Ste. 205
San Diego, CA 92101

Ozell Parker
(Claimant)

(Wage Earner) (Leave blank if same as above.)

(Social Security Number)

Title XVI
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 100.00 for your services rendered before the Social Security Administration

NOTE: *IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED* an administrative review may be requested by sending a letter within *30 days* to:

Regional Chief Adm. Law Judge
100 Van Ness Avenue
24 Floor
San Francisco, CA 94102

(See reverse side for additional details.)

The paragraph(s) checked below refer to payment of your authorized fee:

☐ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to

☐ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney, or (3) the claim is for supplemental security income.

☒ The authorized fee herein is for all legal services rendered to the claimant (and his/her family) under the Social Security Act.

AUTHORIZING OFFICIAL:

Albert Tom
(Signature)

Albert Tom
(Typed Name)

Administrative Law Judge
(Title)

April 15, 1987
(Date)

cc: (Name and Address of Claimant)

Ozell Parker
614 Cadman
San Diego, CA 92114

REPRESENTATIVE

SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (6/85)
Prior editions may be used

EXHIBIT A(3)
Page 2

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

ALJ TO:

Form Approved
OMB No. 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

PLEASE NOTE INFORMATION ON THE REVERSE

PAPERWORK ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of → Fee $ 1,000
for services performed as the representative of → MR MRS MS OZELL PARKER
in a claim or proceeding before the Social Security Administration
Type of Claim(s) SSI

Enter the name and address of the person on whose Social Security record claim is based
Ozell Parker
614 Cadman
San Diego, CA 92114

Enter the Social Security number of person on whose record claim is based
___/__/____

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1 My services as a representative → Began (month day year) 8/9/85 Ended (month day year) 9/3/86

2 Itemization of services rendered before the Social Security Administration

DATE (mo. day. yr.)	(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)	ACTUAL TIME SPENT
	See attached breakdown	
	If more space is needed, attach separate sheet TOTAL HOURS	6.25

3. Have you and your client entered into a fee agreement for services before SSA? (If "Yes," please specify the amount (or the agreed-upon formula).) ☒ YES ☐ NO
25% retroactive $

4. Have you received, ~~or do you~~ expect to receive, any payment toward your fee from funds held in an escrow or trust account, or from any other source? (If "Yes," please specify the amount.) ☒ YES ☐ NO
$ 1,000

5. Have you received, or do you expect to receive, reimbursement for expenses you incurred? (If "Yes," please itemize) ☒ YES ☐ NO
$

Dr. Reiner - report $ 25.00
Dr. Moore - report $ 25.00

6. Did you render any services relating to this matter before any State or Federal Court? (If "Yes," what fee did you or will you charge for services in connection with the court proceeding?) ☐ YES ☒ NO
$

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative
STEPHEN GOREY

Date 1/27/87

Address
401 W. "A" Street-Ste. 205
San Diego, CA 92101

Firm with which associated, if any
Stephen Gorey

Telephone No. and Area Code
619 239-8711

FORM SSA-1560-U4 (3-83)
Destroy prior editions

REPRESENTATIVES COPY

EXHIBIT A(3)
Page 3

REQUEST FOR APPROVAL O: . FEE FOR REPRESENTING OZE PARKER BEFORE THE SOCIAL SECURITY ADMINISTRATION

Date	Description	Hours
8/9/85	Telephone interview with client.	0.0
8/13	Initial Interview.	1.0
8/14	Call from client's husband re: client does limited homemaking for county. Discuss.	.25
8/29	Call from client. Discuss effect on SSI benefits of receipts from county.	.25
9/4	Complete Request for Reconsideration and process to District Office.	.5
9/9	Receive acknowledged copy of Reconsideration.	.25
10/7	Receive Reconsideration denial.	.25
10/7	Letter to client with instructions for appeal.	.25
10/11	Complete forms for Request for Hearing. Process to District Office.	.25
10/16	Receive acknowledged copy of Request for Hearing. Verify timely filing.	.25
10/23	File review.	.25
10/23	Request medical records form Dr. Reiner and Dr. Mehran.	.25
11/5	Receive and review medical records from Dr. Reiner.	.25
11/22	Letter to client.	.25
11/25	Call from client's son-in-law.	.25
2/7/86	Call from client for status.	.25
4/24	Receive and review favorable decision.	.25
4/24	Letter to client.	.25
4/28	Call from client. Discuss her SSI priority redetermination interview at District Office tomorrow.	.25
7/11	File review. Call to District Office for status. They are waiting for "initial claims" group to do manual computations.	.25
8/12	Call from client.	.25
9/3	Receive SSI Notice of Decision. Call to District Office.	.25
	TOTAL HOURS	6.25

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administration

Region IX
100 Van Ness Avenue
San Francisco CA 94102

March 17, 1986

James Carletti, Esq.
443 W. C Street, Suite 101
San Diego, CA 92101

Re: Kenneth Klimecki,

Dear Mr. Carletti:

Upon receipt of your letter dated February 23, 1986 appealing the fee authorized in this case, we reviewed the fee petition and reevaluated the services rendered in connection with this claim.

We have given careful consideration to this matter, taking into account all of the information in our file and in your request. We are convinced that the fee amount of $200.00 authorized on February 12, 1986 by Administrative Law Judge Albert Tom is reasonable compensation for all services rendered in this case and find no reason to modify the original authorization..

Sincerely yours,

Stanley S Sadur

Stanley S. Sadur
Regional Chief
Administrative Law Judge
Office of Hearings and Appeals

cc: Kenneth Klimecki
1051 - 118 Rocksprings Rd.
Escondido, CA 92026

ODO, Attorney Fee Branch

ALJ Tom
OHA, San Diego, CA

EXHIBIT B
Page 1

EXHIBIT B
Page 2

DISABILITY REPRESENTATION

STEPHEN GOREY
LICENSED AS AN
ATTORNEY IN ARIZONA
NOT LICENSED AS AN
ATTORNEY IN CALIFORNIA
PRACTICE LIMITED TO
SOCIAL SECURITY FEDERAL
ADMINISTRATIVE HEARINGS
IN CALIFORNIA

443 WEST "C" STREET
SUITE 101
SAN DIEGO, CA 92101
(619) 239-8711

JAMES S. CARLETTI
FORMER SSA STAFF
ATTORNEY

February 23, 1986

The Honorable Stanley Sadur
Regional Chief Administrative Law Judge
Office of Hearings and Appeals
Social Security Administration
100 Van Ness - 24th Floor
San Francisco, California 94102

Re: KENNETH KLIMECKI
SS#

Dear Judge Sadur:

We request review of Judge Tom's fee authorization. We worked seven (7) hours on this matter. The ALJ states our services were routine in nature.

I would point out that the treating physician, Dr. R. E. Weber, in Exhibit 31 reported non-union. ALJ Tom chose not to believe that report and did seek a follow-up report. Instead he expended, needlessly, government funds on a C.E., Dr. Zaayer, in a notice 5/1/85 - (copy attached).

In the meantime, knowing Judge Tom's propensity for denials, I immediately, after meeting Mr. Klimecki on March 25, 1985, requested a medical report. It appeared to be the obvious thing to do. The injury was well documented. Dr. Weber, the treating physician, is a specialist and highly regarded in the community. There was no reason to doubt the validity of his March 5th letter.

If my ordering a follow-up report and assisting Mr. Klimecki at each step of his claim was routine, what was Judge Tom's action in ordering a C.E.? I believe his hourly rate of pay is the same for routine functions as it is for other work. Please correct me if I am wrong, and Judge Tom returns portions of his pay check.

Mr. Klimecki signed a contract authorizing a fee for 25% of past benefits. We complied with our obligations under the contract. We expended seven (7) hours on the

EXHIBIT B
Page 2

EXHIBIT B
Page 3

case which cannot be considered routine when Judge Tom is involved. Every case must be prepared for U.S. District Court. The District Court Judg[illegible] award attorney fees in the amount of $100.00 per hour, and comment from the Bench that amount is at the low end of the average rate in San Diego.

At a minimum, I believe a fee of $700.00 is fair and appropriate based only on time expended, without regard for our legal contract.

Respectfully,

JAMES S. CARLETTI

JSC/vlf

EXHIBIT B
Page 4

DEPARTMENT OF HEALTH UMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

Date: FEB 12 1986

To: Name and Address of Representative

James CArletti
443 W. "C" st., Ste. 101
San Diego, Ca. 92101

In the case of
Kenneth Klimecki
(Claimant)

(Wage Earner) (Leave Blank if same as above.)

(Social Security Number)

Title II and Title XVI
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 200.00 for your services rendered before the Social Security Administration

NOTE: *IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED*, an administrative review may be requested by sending a letter within *30 days* to:

Regional Chief Administrative Law Judge
100 Van Ness Ave., 24th floor
San Francisco, Ca. 94102

(See reverse side for additional details.)

The paragraph or paragraphs checked below refer to payment of your authorized fee:

☒ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to Office of Disability Operations, Div. of Appeals Processing,
P.O. Box 17295, Baltimore, MD 21203

☐ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney, or (3) the claim is for supplemental security income.

☒ The authorized fee herein is for all legal services rendered to the claimant (and his family) under the Social Security Act.

AUTHORIZING OFFICIAL:

Albert Tom
(Signature)

ALBERT TOM
(Typed Name)

Administrative Law Judge
(Title)

cc: Name and Address of Claimant

Kenneth Klimecki
1051 - 118 Rocksprings Rd.
Escondido, Ca. 92026

REPRESENTATIVE SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L53a-US (8-81)
Prior editions may be used

EXHIBIT B
Page 4

EXHIBIT B
Page 5

DEPARTMENT OF HEALT , HUMAN SERVICES Social Securi Administration

Office of Hearings and Appeals
First National Bank Building
401 West 'A' Street, Suite 310
San Diego, CA 92101

February 10, 1986

James Carletti, Esq.
443 West C Street, Ste. 101
San Diego, CA 92101

RE: Kenneth Klimecki
SSN:

Dear Mr. Carletti:

I have considered your attorney fee petition.

My file shows that the claimant appeared and represented himself at the hearing on March 15, 1985. He had no representative and you did not commence your representation until after the case had been substantially concluded. (Your Appointment of Representative form is dated March 19, 1985, received March 22, 1985.) Following the hearing, I sent the claimant out for a consultative examination which resulted in my issuance of a favorable decision in the case, allowing Mr. Klimecki a closed period of disability.

I fail to see any impact your representation had in the outcome of this case. In evaluating the fair and reasonable fee in this, I am also guided by the Social Security law and regulations which are set forth in the back of the SSA-1560-U4. Your services were routine in nature and I feel that $200.00 is a reasonable fee for your services.

Sincerely,

Albert Tom
ALBERT TOM
Administrative Law Judge

cc: (1) Kenneth Klimecki

(2) Stanley Sadur, RCALJ
OHA Region IX

AT:hi

EXHIBIT B
Page 5

EXHIBIT C
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Region IX
100 Van Ness Avenue, [illegible]8th Fl
San Francisco CA 94102

March 6, 1984

Stephen Gorey, Esq.
443 West "C" St., Suite 101
San Diego, CA 92101

Re: Fee Petitions and Cost Reimbursements;
Your Letter Dated February 24, 1984

Dear Mr. Gorey:

You have requested clarification of two points contained in my letter dated February 13, 1984. A copy of that letter has been attached to clarify my explanation.

You have questioned the use of the word "however" in the third paragraph of my letter and have asked whether a more efficient operation would be penalized by a reduction in fees due to a reduction in processing time or whether an efficient operation would generally not be penalized because a relatively lower number of hours will usually not be a major factor in fee setting.

As I pointed out in my previous letter, the amount of time spent on a particular case is only one, of several, factors to be considered when establishing a fee. The applicable sections of the Social Security Act and the Social Security Administration regulations (42 U.S.C. 406(a) and 1383(d); 20 C.F.R. 404.1725(b) and 416.1525(b)) mandate the factors to be considered when setting fees.

You have also requested clarification of the out-of-pocket expenses you can charge your clients when preparing your cases. This is a matter to be negotiated between you and your clients since the out-of-pocket expenses are actual cash disbursements by you on behalf of your clients. While these expenses are not subject to regulation by the Social Security Administration, you are encouraged to fully disclose these arrangements on your fee petitions. This disclosure will allow the officials authorizing your fee to better evaluate your petitions.

• G P O 1982-587-036 [illegible]

EXHIBIT C
Page 2

If you have any additional questions concerning these matters, please telephone Mr. Roger Leer of the Office of Hearings and Appeals at (415) 556-8905.

Sincerely yours,

Philip J. DiBenedetto
Regional Commissioner

Attachment:
My Letter Dated February 13, 1984

cc:
Samuel Durso, ALJIC
OHA, San Diego, CA (w/ attach.)

EXHIBIT C
Page 2

EXHIBIT D
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Region IX
100 Van Ness Avenue
San Francisco CA 94102

February 13, 1984

Stephen Gorey, Esq.
443 West "C" St., Suite 101
San Diego, CA 92101

Re: Fee Petitions and Cost Reimbursements;
Your Letter Dated January 18, 1984

Dear Mr. Gorey:

You have requested a policy clarification of the provisions of 20 CFR 404.1725(a)(2) regarding the itemization of services provided to your clients when petitioning for the authorization of your fees. You have also requested an explanation about reporting the allocation of time spent by your staff in preparing your clients' appeals and whether out-of-pocket expenses are considered.

Although Mr. Roger Leer of the Regional Office of Hearings and Appeals answered all of your questions by telephone, I believe that written acknowledgement of your letter and a clarification of the Social Security Administration's procedures for authorizing representation fees are appropriate.

As I read your letter, you are concerned that your fees will be reduced if you find more efficient methods which result in a reduction in the actual time you spend on cases. Generally, a more efficient operation would not be penalized by a reduction in the amount of the authorized fee; however, the applicable sections of the Social Security Act and the Social Security Administration regulations (42 U.S.C. 406(a) and 1383(d); 20 CFR 404.1725(b) and 416.1525(b)) mandate the factors to be considered when setting fees. Please note that fees are generally not authorized on an hourly basis, although your time spent is one factor, of several, which must be considered. To facilitate your understanding of these requirements, I have enclosed a copy of a fee petition (Form SSA-1560-U4) which contains a listing of the factors considered on the reverse side of each page.

All attorneys have fixed and variable expenses but this "overhead" should be factored into the hourly rate you charge your clients or absorbed within the percentage of past-due benefits you agree to accept on a contingent fee basis. In other words, the itemizations on your fee petitions should only include your time and expenses incurred for medical reports,

EXHIBIT D
Page 2

expert testimony, testing, photocopying, etc. that you actually disburse. It should not include other normal office expenses common to all cases.

Concerning your question about out-of-pocket expenses, this is a matter which should be negotiated between you and your clients. However, you are encouraged to report on your fee petitions, the out-of-pocket expenses incurred and the terms of your agreements with your clients regarding payment of these expenses. This notification will allow the officials authorizing your fees to better evaluate your petitions. Also, these expenses can always be collected in addition to the authorized fees and are not subject to regulation by the Social Security Administration.

If you have any additional questions concerning these matters, please telephone Mr. Leer at (415) 556-8905.

Sincerely yours,

Philip J. DiBenedetto
Regional Commissioner

Enclosure:
Form SSA-1560-U4

cc:
Samuel Durso, ALJIC
OHA, San Diego, CA

EXHIBIT D
Page 2

EXHIBIT E(1)
Page 1

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

To (Name and Address of Representative)

Stephen Gorey
401 W. "A" St., Ste. 205
San Diego, CA 92101

Willard Miner
(Claimant)

(Wage Earner) (Leave blank if same as above.)

(Social Security Number)

SSDC (Title XVI Only)
(Type of Claim)

Fold Here

You are hereby authorized to charge the claimant the sum of $ 500.00 for your services rendered before the Social Security Administration

NOTE: *IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED*, an administrative review may be requested by sending a letter within *30 days* to:

Regional Chief Adm. Law Judge
100 Van Ness Avenue
24th Floor
San Francisco, CA 94102
(See reverse side for additional details.)

The paragraph(s) checked below refer to payment of your authorized fee:

☐ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to

☐ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

Fold Here

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney, or (3) the claim is for supplemental security income.

☒ The authorized fee herein is for all legal services rendered to the claimant (and his/her family) under the Social Security Act.

AUTHORIZING OFFICIAL:

(Signature)
Albert Tom
(Typed Name)
Administrative Law Judge
(Title)
April 15, 1987
(Date)

cc: (Name and Address of Claimant)

Willard Miner
c/o United States Prison
Box 33
Terre Haute, IN 47808

REPRESENTATIVE

SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (6/85)
Prior editions may be used

EXHIBIT E(1)
Page 1

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

PLEASE NOTE INFORMATION ON THE REVERSE

PAPERWORK ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of → Fee $ 765.00

for services performed as the representative of → MR MRS MS WILLARD MINER

in a claim or proceeding before the Social Security Administration

Type of Claim(s): SSI Init.

Enter the name and address of the person on whose Social Security record claim is based

Willard Miner
8492 San Carlos Drive
San Diego, CA 92119

Enter the Social Security number of person on whose record claim is based

___ ___ ___ / ___ ___ / ___ ___ ___ ___

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

1. My services as a representative → Began (month, day, year) 5/16/83 Ended (month, day, year) 6/8/85

2. Itemization of services rendered before the Social Security Administration

DATE (mo. day, yr.)	*(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)*	ACTUAL TIME SPENT
	See attached breakdown	
	If more space is needed, attach separate sheet **TOTAL HOURS**	9.25

3. Have you and your client entered into a fee agreement for services before SSA? *(If "Yes," please specify the amount (or the agreed-upon formula).)* 25% retroactive ☒ YES ☐ NO $

4. Have you received, or do you expect to receive, any payment toward your fee from funds held in an escrow or trust account, or from any other source? *(If "Yes," please specify the amount.)* ☒ YES ☐ NO $765.00

5. Have you received, or do you expect to receive, reimbursement for expenses you incurred? *(If "Yes," please itemize)* ☐ YES ☒ NO $
$
$

6. Did you render any services relating to this matter before any State or Federal Court? *(If "Yes," what fee did you or will you charge for services in connection with the court proceeding?)* ☐ YES ☒ NO $

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative: STEPHEN GOREY

Date: 6/4/85

Address:
443 W. "C" Street-Ste. 101
San Diego, CA 92101

Firm with which associated, if any: Stephen Gorey

Telephone No. and Area Code: 619 239-8711

FORM SSA-1560-U4 (3-83)
Destroy prior editions

OHA COPY

EXHIBIT E(1)
Page 3

REQUEST FOR APPROVAL OF A FEE FOR REPRESENTING WILLARD MINER BEFORE THE SOCIAL SECURITY ADMINISTRATION

Date	Description	Hours
5/18/83	Initial consultation.	0.0
5/23/83	Client in office for complete interview.	1.5
5/24/83	File review at OHA. Photocopy exhibits.	.75
5/24/83	Set up psychological testing.	.25
5/30/83	Conference with client in office.	.25
6/6/83	Call from client.	.25
6/8/83	Call to client.	.25
6/16/83	Call from client.	.25
6/20/83	Receive and review report from psychologist.	.25
6/21/83	File review. Letters sent to following for records: Dr. Reiss, Dr. Brewer, V.A., CMH, Villa View, Grossmont.	.5
6/21/83	Letter to ALJ.	.25
6/24/83	Call from Grossmont Hospital. Letter to Grossmont Hospital.	.25
6/24/83	Drive to V.A. to pick up records.	.5
6/25/83	Receive and review records from Dr. Reiss.	.25
6/28/83	Submit new evidence to ALJ.	.25
6/28/83	Prepare for hearing. Call to client.	.5
6/29/83	Meet with client and witnesses to prepare for testimony.	.5
6/29/83	Hearing.	1.0
8/18/83	Receive records from CMH.	.25
9/27/83	Call from client.	.25
11/18/83	Call from client.	.25
2/6/84	Call to OHA re: length of time decision is taking.	.25
6/11/84	Receive and review decision. CAll from client.	.25
6/4/85	Prepare fee petition.	.25
	TOTAL HOURS	9.25

EXHIBIT E(2)
Page 1

DISABILITY REPRESENTATION

STEPHEN GOREY, ESQ.
LICENSED AS AN
ATTORNEY IN CALIFORNIA
LICENSED AS AN
ATTORNEY IN ARIZONA

401 WEST "A" STREET
SUITE 205
SAN DIEGO, CA 92101
(619) 239-8711

December 31, 1986

Social Security Administration
Office of Disability Operations
P.O. Box 1039
Baltimore, MD 21241

Re: JOHNSON, Brenda
SS#

To Whom It May Concern:

Enclosed is a copy of our fee petition dated 6/4/85, and our letter of 10/16/86 requesting that our fee petition be processed.

We still have had no response in this matter.

Respectfully,

STEPHEN GOREY

SG:vlf

Encl.

EXHIBIT E(2)
Page 2

DISABILITY REPRESENTATION

STEPHEN GOREY
LICENSED AS AN
ATTORNEY IN ARIZONA
NOT LICENSED AS AN
ATTORNEY IN CALIFORNIA
PRACTICE LIMITED TO
SOCIAL SECURITY FEDERAL
ADMINISTRATIVE HEARINGS
IN CALIFORNIA

401 WEST "A" STREET
SUITE 205
SAN DIEGO CA 92101
(619) 239-8711

JAMES S. CARLETTI
FORMER SSA STAFF
ATTORNEY

October 16, 1986

Office of Disability Operations
Social Security Administration
P.O. Box 1039
Baltimore, MD 21241

Re: BRENDA JOHNSON
SS#

To Whom It May Concern:

Enclosed is a copy of our fee petition regarding Brenda Johnson submitted to the ODO on June 12, 1985.

Your assistance in processing this fee petition would be greatly appreciated.

Sincerely,

STEPHEN GOREY

SG/ssg

Encs.

EXHIBIT E(2)
Page 3

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 0960-0104

PETITION TO OBTAIN APPROVAL OF A FEE FOR REPRESENTING A CLAIMANT BEFORE THE SOCIAL SECURITY ADMINISTRATION

PLEASE NOTE INFORMATION ON THE REVERSE

PAPERWORK ACT NOTICE: While your response to this request is voluntary, no fee may be approved unless all the information requested by this form has been received. The information will be used to determine a fair value for services you rendered to the claimant named below, as provided in section 206 of the Social Security Act (42 U.S.C. 406).

I request approval to charge a fee of →	Fee $ 200.00
for services performed as the representative of →	MR MRS MS BRENDA JOHNSON
in a claim or proceeding before the Social Security Administration	Type of Claim(s) SSI Init.

Enter the name and address of the person on whose Social Security record claim is based
Brenda Johnson
3154 Imperial Ave. - Apt. 3
San Diego, CA 92102

Enter the Social Security number of person on whose record claim is based
___/__/___ _

THE INFORMATION BELOW IS FURNISHED IN SUPPORT OF THIS PETITION

		Began (month, day, year)	Ended (month, day, year)
1.	**My services as a representative** →	2/8/85	6/4/85

2. Itemization of services rendered before the Social Security Administration

DATE (mo. day yr.)	*(Itemize each meeting, conference, item of correspondence, telephone call, and each activity engaged in, such as research, preparation of a brief, attendance at a hearing, travel, etc., related to your services as representative in this case.)*	ACTUAL TIME SPENT
	See attached breakdown	
	If more space is needed, attach separate sheet **TOTAL HOURS**	4.0

3.	Have you and your client entered into a fee agreement for services before SSA? *(If "Yes," please specify the amount (or the agreed-upon formula).)* 25% retroactive	☒ YES ☐ NO $
4.	Have you received, or do you expect to receive, any payment toward your fee from funds held in an escrow or trust account, or from any other source? *(If "Yes," please specify the amount.)*	☒ YES ☐ NO $ 200.00
5.	Have you received, or do you expect to receive, reimbursement for expenses you incurred? *(If "Yes," please itemize).*	☐ YES ☒ NO $
		$
		$
6.	Did you render any services relating to this matter before any State or Federal Court? *(If "Yes," what fee did you or will you charge for services in connection with the court proceeding?)*	☐ YES ☒ NO $

I certify that the above information is true and correct to the best of my knowledge and belief. I further certify that I have furnished a copy of this petition and any attachments to the person(s) for whom the above services were performed. NOTE: Only the individual appointed as the representative may sign this fee petition.

Signature of Representative	Date	Address
STEPHEN GOREY	6/4/85	443 W. "C" Street-Ste. 101 San Diego, CA 92101
Firm with which associated, if any		Telephone No. and Area Code

FORM **SSA-1560-U4**

REPRESENTATIVES COPY

EXHIBIT E(2)
Page 3

EXHIBIT F
Page 1

D/L
42/nr

Social Security Notice

From: Office of Disability Operations
Baltimore, Maryland 21241

Date: February 26, 1985

Claim Number:

Stephen Gorey
Attorney at Law
442 "C" St., Suite 101
San Diego CA 92101

The Bureau of Hearings and Appeals authorized you a fee of $1,088.50 for services rendered George I. Gardner in proceedings before the Social Security Administration.

The law provides that the Social Security Administration shall withhold up to 25 percent of a claimant's past-due benefits for direct payment of an approved fee to the attorney. We regret that, inadvertently, we prematurely released the withheld benefits. If you experience difficulty in collecting the fee from your client, you should notify us. We will then proceed to withhold benefits from George I. Gardner to the extent of your approved fee or the amount that should have been withheld, whichever is smaller.

A copy of this notice is being sent to your client.

Department of Health and Human Services
Social Security Administration

Form SSA-L1076-C2 (8-79)

EXHIBIT F
Page 1

EXHIBIT F
Page 2

SOCIAL SECURITY ADMINISTRATION

Western Program Service Center
Richmond, California 94802

Date: April 27, 1987

Claim Number:

Stephen Gorey Esq
Attorney For George I Gardner
401 W A St Ste 205
San Diego CA 92101

We are sending a check for $1,088.50 within a few days. This check represents fees due you as the attorney for George I Gardner.

If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 60 days from the date you receive this notice. You may make any such request through any Social Security office. If additional evidence is available, you should submit it with your request.

If you have questions about your claim, you may get in touch with any Social Security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

L563 M22925/eab

EXHIBIT F
Page 2

Chairman JACOBS. Thank you, sir.

The eyes of the world are on Texas, Mr. Rolnick.

STATEMENT OF ROBERT L. ROLNICK, ESQ., HOUSTON, TX

Mr. ROLNICK. I thank you, Mr. Jacobs. I do want to thank you for allowing me to be here today. And I would like to have my entire written statement provided in the record.

As I stated at the beginning of my statement, I do live in the Houston area. I actually rise in Congressman DeLay's district. However, I do represent people from all parts of the city, including Congressman Archer's district.

I feel that I probably do more of this type of disability work in the Houston area than any other attorney, and by the process of elimination I feel certain that if anyone has represented most of Congressman Archer's constituents for the Social Security Administration in the past two or three years, it would be myself.

Now, my clients are citizens from a broad spectrum of the public. Some are aerospace engineers applying for disability after heart attacks. Some are truck drivers and warehouse workers with little education apply for benefits after industrial injuries.

All, however, are sick. They are out of work. They all contributed to the Social Security system. They have had their claims for disability rejected by the Social Security Administration at least once. All are represented on a contingency basis, 25 percent of the past-due benefits because few if any would be able to afford anything else.

I have attached as exhibits an analysis of the favorable decisions that I secured at the ALJ level for Social Security disability claimants during 1985 and the first 9 months of 1986. I am omitted all unfavorable decisions on which no fee was received as well as cases that were decided at other levels.

I agree that—kind of an answer to your question to the gentleman from Chicago—not everyone I represent will win their case. However, I do not take a case if it appears at the outset that it is an absolute loser and the person is trying to abuse the system. I agree with the gentleman from Chicago, it is very difficult to determine exactly who is going to prevail and who is not going to prevail but based on the intake information I make a subjective decision whether I feel representing this particular claimant is going to be reasonable and going to have a chance.

No. 2, I agree that is possible that some of these people might have been able to secure a favorable decision on their own, just to point that out. However, it pretty clear that attorney representation is going to increase their chances.

Thirdly, whenever I won a case it was because the medical or vocation evidence supported disability and not solely because of great lawyering skills. What I do is gather the evidence that supports disability, try to bring down lay witnesses, doctors, et cetera, to try and prove their case.

My clients, even the most educated one, have no idea what evidence supports disability or what the law is. They need my service. But I cannot provide this service unless I get paid for it.

The new rules, of course, have been very well documented by the other speakers, and I will not go into that again. I would simply emphasize the amount to be authorized at the ALJ level as well as the hourly standard.

Now, if these new rules on Social Security claims are implemented, attorneys' fees on Social Security disability claims are implemented, I will be forced to discontinue representation of disabled individuals with claims before the Social Security Administration.

In reviewing the favorable decisions rendered in 1985 and 1986 as set forth on my analysis, please be advised that each time 25 percent of the past-due benefits exceeded $3,000 I petitioned for a fee of exactly $3,000. In all other cases I petitioned for 25 percent of the past-due benefits or the amount authorized by the ALJ was exactly $3,000, same represents a situation where 25 percent of the past-due benefits exceeded $3,000.

The highest hourly rate ever received under a contingent fee contract was $157.87 per hour. The average hourly rate for 1985 was $91.61 and for 1986 $82.99. Again, this is just a rate in favorable cases, no weighting for zero received in unfavorable cases.

However, if the fee was going to be restricted to $1,500 or 25 percent of the past-due benefits, whichever is less, which apparently is what the ALJ can now approve, the average hourly rate would drop to $62.55 for 1985 and $57.78 for 1986. If the fee is going to be restricted to the greater of $1,500 or the lesser of $75 per hour or 25 percent of the past-due benefits, whichever is less—the maximum that apparently will be approved under these guidelines—the average fee per hour would be $71.86 for 1985 and 65.27 for 1986. The difference—and that is the reduction between the amount received under the old rules and the amount that would be approved under the suggested new system—would be in excess of $14,000 for 1985 and in excess of $9,000 in 1986 provided a 25-percent reduction. The simple fact is that I cannot absorb this type of loss and will discontinue Social Security disability practice if the new rules are not changed.

The rules issued by Commissioner Bradley state that the procedure is not intended to protract the payment process. I do not believe that. If the rules followed all fee petitions in excess of $1,500 would have to go through the regional ALJ's office in Dallas. I hope the members of this body would see how ridiculous these rules are and that their only purpose would be to frustrate efforts of disability claimants to obtain attorneys.

The attorney fee process start out with a written contract. The work is then done. And the award certificates are gathered which show how much 25 percent of the past-due benefits is. And then those are submitted to the ALJ. The ALJ, who heretofore had authority to authorize the fee, now is going to be recommending the fee to regional. It makes absolutely no sense. The people that are going to be reviewing this at the regional, the only way they can review the volume of these types of fee petitions, assuming attorneys are not intimidated, is going to be review them with nonattorney staff.

There is certainly no justification to think that the regional guy, regional judge, would not go by the recommendation of the ALJ. It's obvious that the purpose of these rules is intimidation.

In conclusion let me state the following: The problems with attorney's fees in Social Security disability cases are created solely by the Social Security Administration. The answer to the attorney's fee problem is so easy it is clear the administration is not seeking a solution but is seeking to eliminate attorney representation in these cases. These cases must be handled on a contingency basis because disability claimants have no resources to pay a fee other than a percentage of benefits.

There should be a presumption that if the attorney has participated in the hearing of the claim, the attorney's fee should be set at 25 percent of the past-due benefits up to a pre-stated maximum; that is, $3,000 as it was before or $4,000 that has been suggested.

When the claim is granted at the hearing level after administrative hearing in which the attorney has participated, the attorney should be paid 25 percent of the past-due benefits up to the prestated maximum without the necessity of a fee petition.

I would like to point out in response to a question by Congressman Archer with regard to workers compensation, this is exactly the way it is done in workers compensation cases.

And in answer to a question by Mr. Jacobs, in Texas at least, although private insurance companies do follow the procedure of sending out a dual check or a check made payable to the attorney and the claimant when there is a lump sum settlement in the workers compensation, when the State of Texas is the employer and you represent a claimant who was—excuse me, a worker who was working for the State of Texas when he was injured, you go before the industrial accident board and get a lump sum settlement of let's say $6,000, the State of Texas will issue one check in the amount of $4,500 to the disabled worker and one check in the amount of $1,500 to the attorney as the attorney's fee.

There is no reason Social Security could not do that in this particular case—these particular cases. If the amount of the past-due benefits exceeded the prestated maximum, then the attorney if he desired could filed a fee petition to illustrate why in that particular case a fee in excess of the prestated maximum could be approved.

If these rules were followed, 95 percent of all fee petitions would be eliminated, the attorney would be compensated from the same funds that already exist, processing time and expense in conjunction with fee petitions would be reduced and the claimants would be adequately protected from unreasonably high fees where 25 percent of the past-due benefits was arbitrarily high.

I would point out that the Commissioner's report—Inspector General's report points out—and I would sort of agree with that—the ALJ is not really following the existing regulations. They are following exactly what I am saying.

The reason they are following exactly what I am saying is that this is the appropriate fee. The six examples cited in the report by the Inspector General, in each case the fee awarded by the ALJ was clearly the appropriate fee. It was 25 percent of the past-due benefits up to the prestated maximum that could be authorized at that particular level.

It is clear that there are instances where the amount of past-due benefits is arbitrarily high simply because the claim has been pending a long period of time.

To a certain extent I would agree that the attorney should not get $7,000, $8,000, $9,000, $10,000 for representing an individual before the administrative law judge. But it is absolutely ridiculous and unconscionable to believe that if the attorney gets an award of $8,000 and 25 percent is $2,000 that he should not be paid $2,000.

And that is simply what the fee should be. That is the agreement with the clients. It is completely in accordance with the exactly the way these claims were administered at all other levels.

These rules, the rules issued by Ms. Bradley on March 31 are rules that no one outside of Social Security wants. I have personally spoken with five of the six ALJ's in the Houston office of appeals and they all disapprove of these rules. The chief ALJ in Houston, Judge William Helsper, informed me that he talked with regional and they are not in favor of these rules. They do not have any staff to review these things. However, I have received letters from OHA saying that they are sending these things up to regional.

I am certainly not in favor of these rules. And I ask that the subcommittee use its authority to see that these rules are rescinded and that a fairer and equitable system is implemented.

I thank you very much for you attention and I hope that you have some specific questions not only for me as well as the others.

[The statement of Mr. Rolnick follows:]

Prepared Statement for the Oversight Hearing by the Social Security Subcommittee on Attorney's Fees

My name is Robert Rolnick and I am an attorney at law. I practice in the Houston, Texas area. I reside in Congressman Thomas DeLay's district (Sugar Land, Texas). My practice concentrates in personal injury representation and I frequently represent sick or injured individuals with claims for disability benefits before the Social Security Administration. While I have no statistics readily available to show exactly how many of the Social Security disability claimants I have represented resided in Congressman Archer's district (Congressman Archer being the ranking minority member of this Subcommittee), I feel confident that in the past three years I have represented more of Congressman Archer's constituents before the Social Security Administration than anyone else.

I have come before you today to speak out against the proposed changes in the way in which attorney's fees will be administered in Social Security disability claims. While the stated purpose of these rules is to insure that disability claimants are not overcharged for representation before the Social Security Administration, implementation of these rules will have quite the opposite effect. Implementation of these rules will mean that private attorneys will not be available to represent Social Security disability claimants regardless of the merits of that individual's claim.

My Clients

My clients are citizens from a broad spectrum of the public. Some are aerospace engineers applying for disability benefits after heart attacks; some are truck drivers and warehouse workers with little education applying for disability benefits after industrial injuries. All, however, have a common thread. They are quite sick, out of work, have contributed to the Social Security system and had their claims for disability rejected by the Social Security Administration at least once. All are represented on a contingent fee basis (25% of the past-due benefits as the fee) because few, if any, would be able to afford anything else.

I have attached as an exhibit an analysis of the favorable decisions that I secured at the ALJ level for Social Security disability claimants during 1985 and the first nine months of 1986. All unfavorable decisions (and there were some) have been omitted as well as cases which were decided at other levels. I will freely admit the following facts:

1. Not every individual who I represent in a disability case will eventually obtain disability benefits.

2. Some of the people for whom I obtain favorable decisions at the Administrative Law Judge level would have obtained favorable decisions even without my assistance.

3. Whenever I won a case, it was because the medical and/or vocational evidence supported disability. Great lawyering skills alone will not win a disability case at the ALJ level.

What I do is gather the evidence that supports disability and argue the case on the client's behalf. Unless I can be paid for this work, I cannot provide this service. And since my clients have no idea what evidence supports disability, or what the law is, they need my service.

The Old Rules

The fee-setting jurisdiction rested with the component of the administration where the services were concluded - the processing center if the claim was granted below the hearing level (i.e., initial or reconsideration), the ALJ or the Appeals Council. There was no guideline as to how much could be charged per hour. If the attorney's services were concluded at the ALJ level, the fee petition was submitted to the ALJ. The ALJ had no restriction on the amount of attorney's fee that could be authorized per hour, but the maximum attorney's fee that the ALJ could authorize was $3,000.00. If the attorney requested a fee in excess of $3,000.00, the ALJ would forward the request to Regional Administrative Law Judge for ruling. Virtually all fee petitions requested fees of $3,000.00 or less because either (a) 25% of the past-due benefits were less than $3,000.00; or (b) even though 25% of the past-due benefits exceeded $3,000.00, the attorney would petition for $3,000.00 which represented the maximum of the ALJ's authority in these types of cases. The system was cumbersome and could be improved upon, but at least was workable.

The New Rules

The Social Security Administration now seeks to change this sytem drastically. Social Security's desire to change this system is based on the fatally flawed report of the Office of the Inspector General dated January 14, 1987. Based on the recommendations of that report, a memorandum has issued to all ALJ's restricting the amount of attorney's fees that they can authorize in these cases. Specifically, the ALJ's authority now has been reduced from $3,000.00 to $1,500.00. Fees in excess of $1,500.00 must now be sent to the Regional Administrative Law Judge for approval. Also, a $75.00 per hour guideline has been established as a reasonable fee.

I have come here at my own expense not because these new rules will affect my law practice, although they certainly will, but because I know that because of the work that I have done for disability claimants at the ALJ level, some of my clients secured favorable decisions that they would not have secured in the absence of my representation. To deny these people representation is not fair and is a denial of due process.

Why the New Rules Must Not Be Implemented

If the new rules on Social Security disability claims are implemented, I will be forced to discontinue representation of disabled individuals with claims before the Social Security Administration. In reviewing the favorable decisions rendered in 1985 and 1986 as set forth on my analysis, please be advised that each time 25% of the past-due benefits exceeded $3,000.00, I petitioned for a fee of $3,000.00. In all other cases, I petitioned for 25% of the past-due benefits. Where the amount authorized by the ALJ was exactly $3,000.00, same represents a situation where 25% of the past-due benefits exceeded $3,000.00. The highest hourly rate ever received under a contingent fee contract arrangement was $157.89 per hour. The average hourly rate for 1985 was $91.16 and for 1986 was $82.99. However, if the fee was restricted to $1,500.00 or 25% of the past-due benefits, whichever is less (what the ALJ can now approve), the average hourly rate would drop to $62.55 for 1985 and $57.78 for 1986. If the fee was to be restricted to the greater of $1,500.00 or the lesser of $75.00 per hour or 25% of the past-due benefits, whichever is less (the maximum that apparently will be approved under these guidelines), the average fee per hour would be $71.86 for 1985 and $65.27 for

1986. The difference between the amount received under the old rules and the amount that would be approved under the suggested new system would be in excess of $14,000.00 for 1985 and in excess of $9,000.00 for the first nine months of 1986. The simple fact is that I cannot absorb this type of loss and will discontinue Social Security disability practice if the new rules are not changed.

Delay and Intimidation

The rules issued by Commissioner Bradley state that the procedure is not intended to protract the payment process. I don't believe that. If the rules are followed, all fee petitions (in my region) in excess of $1,500.00 will have to go through the regional ALJ's office in Dallas. I hope that the members of this body would see how ridiculous these rules are and that their only purpose can be to frustrate efforts of disability claimants to obtain attorneys. The attorney fee process starts when the claimant and the attorney agree on a fee, usually 25% of the past-due benefits. Then the fee information is gathered and submitted to the ALJ for approval. The attorney, even under these new rules, will be petitioning for the same fee. The ALJ, who heretofore had authority to authorize the fee, now is going to be recommending the fee to Regional, where the decision will be made. This makes no sense. The attorney and the client agree on a fee. The attorney, who should know what time is worth, submits the petition. The attorney ALJ recommends the fee. In light of the volume of fee petitions that would be submitted to Regional, the only way they would be processed would be if low level clerks reviewed them. The only purpose of these rules can be to further delay receipt of attorney's fees and/or to intimidate attorneys from taking these cases.

Conclusion

The problems with attorney's fees in Social Security disability cases are created solely by the Social Security Administration. The answer to the attorney's fee problem is so easy it is clear the Administration is not seeking a solution but is seeking to eliminate attorney representation in these cases. These cases must be handled on a contingency basis because disability claimants have no resources to pay any fee other than a percentage of benefits. There should be a presumption that if the attorney has participated in the hearing of the claim, the attorney's fee should be set at 25% of the past-due benefits up to a pre-stated maximum; i.e., $3,000.00 or $4,000.00. When the claim is granted at the hearing level after administrative hearing in which the attorney has participated, the attorney should be paid 25% of the past-due benefits up to the pre-stated maximum without the necessity of a fee petition. The ALJ should simply state in his decision that the claimant was represented by an attorney and the fee paid to the attorney. If the case is granted after an administrative hearing and 25% of the past-due benefits exceeded the pre-stated maximum, then the attorney should be paid the pre-stated maximum and could, if he desires, file with the Regional Administrative Law Judge a fee petition to attempt to illustrate why he should be entitled to fees above the pre-stated maximum. By adopting these simple rules, 95% of all fee petitions would be eliminated, the attorney would be compensated from the same funds that already exist, processing time and expense in conjunction with fee petitions would be reduced and the claimants would be adequately protected from unreasonably high fees where 25% of the past-due benefits was arbitrarily high.

These rules are rules that no one outside of Social Security wants. I have personally spoken with five of the six ALJ's in the Houston Office of Hearings and Appeals and they all disapprove of these rules. The chief ALJ in Houston, Judge William H. Helsper, informed me that Regional is not in favor of these rules. I'm sure few, if any, disability claimants have complained to members of Congress requesting these rules. And I, most definitely, am not in favor of these rules. I ask that this subcommittee use its authority to see that these rules are rescinded and a fairer system implemented. Thank you very much for your attention.

Case #	Name	Col 1 Date of Decision	Col 2 # of Hrs on Petition	Col 3 Amt Authorized	Col 4 Rate Authorized per hr	Col 6 Lesser of amt Authorized or 1500-	Col 7 Col (2)x$75/hr	Col 8 Lesser of Col (7) or Col (3)	Col 9 Greater of Col 6 or (8)	Δ (Col 3 - Col 9)
85-1		1-28-85	1750	127658	7294	127658	131250	127658	127658	0
85 2		2-22-85	2000	3000-	15000	1500-	1500-	1500-	1500-	(1500-)
85 3		3-11-85	2425	3000-	12371	1500-	181875	181875	181875	(118125)
85 4		3-20-85	2725	3000-	11009	1500-	204375	204375	204375	(95625)
85 5		3-25-85	2650	214312	8089	1500-	198750	198750	198750	(15612)
85 6		3-28-85	2875	3000-	10434	1500-	215625	215625	215625	(84375)
85 7		4-1-85	2675	3000-	11214	1500-	200625	200625	200625	(99375)
85 8		4-1-85	2725	2175-	7981	1500-	204375	204375	204375	(13125)
85 9		4-15-85	2150	1900-	8830	1500-	161250	161250	161250	(28750)
85 10		4-15-85	2350	207525	8830	1500-	176250	176250	176250	(31275)
85 11		4-16-85	3075	228010	7414	1500-	230625	228010	228010	0
85 12		4-15-85	2075	16470	793	16470	155625	16470	16470	0
85 13		4-26-85	2600	3000-	11538	1500-	1950-	1950-	1950-	(1050-)
85 14		4-[illegible]-85	2200	2500-	11363	1500-	1650-	1650-	1650-	(850-)
85 15		6-7-85	1925	158250	8220	1500-	144375	144375	1500-	(8250)
85 16		6-18-85	1950	219375	10995	1500-	146250	146250	1500-	(69375)
85 17		6-21-85	1525	1315-	7967	1315-	114375	114375	1315-	0
85 18		6-22-85	1900	3000-	15789	1500-	1425-	1425-	1500-	(1500-)
85 19		6-26-85	2425	2165-	8927	1500-	181875	181875	181875	(34625)
85 20		7-10-85	2400	3000-	125-	1500-	1800-	1800-	1800-	(1200-)
85 21		7-10-85	2550	159950	6272	1500-	191250	159950	159950	0
85 22		7-17-85	1775	156475	8813	1500-	133125	133125	1500-	(6475)
85 23		8-21-85	2250	1524-	6773	1500-	168750	1524-	1524-	0
85 24		8-27-85	2750	3000-	10909	1500-	206250	206250	206250	(93750)
85 25		8-29-85	1675	1053-	6286	1053-	125625	1053-	1053-	0
85 26		9-10-85	3025	132027	4364	132027	226875	132027	132027	0
85 27		9-6-85	1025	1361-	13278	1361-	76875	76875	1361-	0
85 28		9-20-85	2500	249250	9970	1500-	187500	187500	1875-	(61750)
85 29		10-4-85	1850	111808	6044	111808	138750	111808	111808	0
85 30		10-7-85	1675	162075	9676	1500-	125625	125625	1500-	(12075)
85 31		12-5-85	2275	215250	9461	1500-	170625	170625	170625	(44625)
85 32		12-26-85	2300	1723-	7491	1500-	1725-	1723-	1723-	0
85 33		12-27-85	1875	162750	8680	1500-	140625	140625	1500-	(12750)
	TOTAL		74375	6117655	N/A	4650863			5342898	(1439757)
	Avg		2253	205392	9116	140935			161906	
					Avg/hr	6255			7186	

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W-N #	NAME	Col 1 Date of Le Closed	Col 2 # of Hours Ret'd	Col 3 Amt Auth.	Col 4 Rate Auth/hr	Col 6 Lesser of Amt Authorized or $1500	Col 7 Col (2) x $75/hr	Col 8 Lesser of Col 7 or Col (6)	Col 9 greater of Col (8) or Col (5)	Δ (Col 3 - Col 9)
86 1		1-16-86	1925	125275	6509	125275	144375	125275	125275	0
86 2		1-15-86	2975	90150	3030	90150	223125	90150	90150	0
86 3		1-23-86	2150	3000-	13953	1500-	161250	161250	161250	(138750)
86 4		1-23-86	2600	135615	5215	135615	1950-	135615	135615	0
86 5		1-28-86	2450	88170	3598	88170	183750	88170	88170	0
86 6		1-30-86	2525	3000-	11881	1500-	189375	189375	189375	(110625)
86 7		2-24-86	2900	3000-	10345	1500-	2175-	2175-	2175-	(825-)
86 8		2-27-86	2450	3000-	12244	1500-	183750	183750	183750	(116250)
86 9		3-25-86	2250	185720	8254	1500-	168750	168750	168750	(16970)
86 10		3-12-86	1850	2043-	11043	1500-	138750	138750	1500-	(543-)
86 11		4-7-86	2225	205950	9256	1500-	166875	166875	166875	(39075)
86 12		4-10-86	1525	1047-	6865	1047-	114375	1047-	1047-	0
86 13		4-11-86	1500	532-	354	532-	1125-	532-	532-	0
86 14		4-21-86	2225	144482	6493	144482	166875	144482	144482	0
86 15		5-30-86	2175	184920	8502	1500-	163125	163125	163125	(21795)
86 16		6-23-86	2700	238087	8817	1500-	2025-	2025-	2025-	(35587)
86 17		7-16-86	2100	247550	11788	1500-	1575-	1575-	1575-	(90050)
86 18		7-24-86	2950	1855-	6288	1500-	221250	1855-	1855-	0
86 19		7-25-86	2150	136260	6337	136260	161250	136260	136260	0
86 20		7-29-86	2650	3000-	11320	1500-	198750	198750	198750	(101250)
86 21		8-8-86	2050	3000-	14634	1500-	153750	153750	153750	(146250)
86 22		8-29-86	2125	1350-	[illegible]	1350-	[illegible]	1350-	1350-	0
86 23		9-16-86	2725	2155-	7908	1500-	204375	204375	204375	(11125)
TOTAL			53875	4470379		3112950			3515850	(954537)
AVG			2342	194364	8299	135341			152863	
					Avg/hr	5778			6577	

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Chairman Jacobs. Thank you, Mr. Rolnick.

Mr. Archer.

Mr. Archer. Mr. Rolnick, to your knowledge how many lawyers in the Houston area handle these type cases?

Mr. Rolnick. Five.

Mr. Archer. In the entire Houston area?

Mr. Rolnick. Five to ten on a regular basis. Most of them do them on a—you know, Congressman, let me respond this way. To a certain extent the attorneys in the private sector, lie somewhere between the martyrs that sometimes we get up there and say that we are and the money grabbing people that want to come in there and grab 25 percent of the past-due benefits just because a person happens to be sick.

I am not going to sit here, like Gary Hart and say, audit my tax return and you will see exactly how much money there is available in this particular type of practice. The truth in fact is that if the fee was set at 25 percent of the past-due benefits up to the maximum of $3,000 or perhaps increased to $4,000, which I think is appropriate, and the money was paid exactly when the claimant received his money, as is the situation in every other type of injury case, I could hire the clerical staff that I need to do this type of work, to keep these people represented.

And, no, Congressman Jacobs, I cannot represent every single person. There is no prescreening involving in filing a Social Security disability claim. Some of these people are no sicker than you or I. And, yes, it is important for the attorney to weed those out. Some of the claimants are dishonest, I agree with that.

But most of these people—the vast majority of these people, number one, are sick. All of them are not working. And they have good, legitimate claims before the Social Security Administration.

The ALJ's recognize that. I think if you—the problem with fee petitions are that the ALJ's are following the wrong regulations. They all agree—I mean everyone that I have talked to, the report simply sets out that this is what the regulations should be. The fee should be 25 percent of the past-due benefits up to whatever prestated maximum that this committee feels is appropriate.

If you want to have every claimant represented, set the prestated maximum at $8,000. If you want to have no claimants represented, you set the pre-stated maximum at $500. And that is the crux of the problem.

I did one of these cases where it was a plain case. The guy was a big wage earner. He had a wife, he had children. The judge reopened a prior application and there was $30,000 in past-due benefits. I know $7,500 is not the appropriate fee in that particular case, I agree with that. $3,000 is the appropriate fee. That is what I petitioned for. That is what the judge approved.

If the ALJ's were simply given—not even the ALJ's. If this committee would simply issue the appropriate regulation the problem would be solved and these people would have representation.

Mr. Archer. Thank you very much, Mr. Rolnick.

Chairman Jacobs. Mr. Atkins, you do not suppose that IBM repair person used to be a lawyer; do you?

Mr. **Atkins**. I think they want to sell me another piece of equipment is why they are charging that hourly rate. But it is true, this is what business costs are.

Chairman **Jacobs**. Yes, sure. We thank you for your contributions to the record.

This concludes the hearing—at least I thought it did.

Go ahead.

Mr. **Atkins**. Mr. Chairman, I would appreciate it if my prepared remarks were included in the record.

Chairman **Jacobs**. Yes. The prepared remarks from all the witnesses will be included unless they wish otherwise.

[Whereupon, at 11:28 a.m., the hearing was adjourned.]

[Submissions for the record follow:]

STATEMENT BY
HON. BILL ALEXANDER
BEFORE THE SUBCOMMITTEE ON SOCIAL SECURITY

Wednesday, May 13, 1987

Mr. Chairman, I would like to commend you for calling this hearing on Social Security attorneys' fees today. I appreciate the opportunity to express my concern about recent developments regarding this important link in the Social Security claimants' appeal process.

As you know, the battle to protect Social Security benefits for those rightly entitled to them has been going on for several years now. Progress has been made. But, as these hearings will surely reveal, the struggle must continue. The Administration's latest attempt to cut fees paid to attorneys representing Social Security claimants represents a swipe at the reforms made. The changes proposed by the Social Security Administration (SSA) threaten to severely limit legal representation for those claimants who believe their benefits have been withheld unjustly.

A number of attorneys in First District in Arkansas, which I represent, have expressed their concern about the potential negative effects of these changes.

First, a standard of $75 per hour for attorney fees is not realistic compared to the going rate of $100 to $125 per hour in First District.

Second, the processing of a Social Security claim already takes a long time. By limiting the Administrative Law Judges' (ALJs) approval for fees to $1,500, the SSA is ensuring an even longer processing time. Furthermore, the SSA proposal takes the decision to reimburse out of the hands of the ALJ who is most familiar with the claims, and puts it in the hands of a regional office that has not witnessed the attorney's presentation nor heard first-hand the medical evidence gathered for the client by that attorney.

I am very disturbed by these potential effects. The lower payments received, and the delay in receiving them, could discourage some attorneys from handling Social Security cases. This SSA proposal will almost certainly reduce the amount of private sector legal services available to Social Security claimants who have a legitimate reason and basis for their appeal of an SSA decision to deny Social Security benefits to them.

Savings to the SSA which come at the expense of the attorneys who represent Social Security claimants ultimately come at the expense of the claimants themselves.

Therefore, Mr. Chairman, I am asking that this Subcommittee take action to stop the SSA proposal.

I support a restoration of the guidelines used to determine attorney fees prior to March 1987. Furthermore, I support a moratorium on any further changes to the payment system until a study of the current system determines how well it is or isn't working. In this way, a comprehensive review with input from a variety of sources could, with wisdom, direct any broad policy changes.

While there is room for some constructive changes in the Social Security claimants' appeal process, these changes should not come at the expense of reason and thoughtfulness. And, they should not come without input from a number of sources involved in the appeal process.

The National Organization of Social Security Claimants' Representatives has proposed a reform package which is sound and deserves careful consideration. It should be included in any debate concerning reform in the claimants' appeal process.

Mr. Chairman, we in Congress must continue the struggle to ensure that those who have a just claim against the SSA can receive adequate and competent legal representation. The rejection of the Administration's recent attorney fee proposal is a fundamental element in that struggle.

Mr. Chairman, again, I thank you for the opportunity to present this statement today.

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

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PAST PRESIDENT

CHARLES N. BONO
Kansas City, MO 8-758-2106
816-374-3756

Congressman Andy Jacobs, Jr.
Chairman, Social Security SubCommittee
Committee on Ways and Means
1533 Longworth H.O.B.
Washington, D.C. 20515

Dear Chairman Jacobs:

The association has been advised that hearings on attorney fees in Social Security Disability cases are to be held on May 13, 1987. Unfortunately we did not become aware of the hearings until late last week.

The association however has not been uninformed or unaware of the several problems in this area. Over the past several years the matter of attorney fees has been discussed by the Officers and Boards. Moreover, the association at its July 1985 meeting went on record with regard to where the authority for filing reasonable fee should lie and rightfully so. Please see the attached resolution. In addition the association reaffirmed its position this past April in its annual meeting.

Recently the Commissioner on Legal Problems of the Elderly or the American Bar Association has requested the preparation of a paper on this matter and the same is under final consideration and preparation.

It is out understanding that legislation has been offered by Congressman Barney Frank calling for a moratorium on the Administrations present policy and also the creation of a Commission to study this very delicate matter. We would have no objection to this legislation so long as the association is considered as a participant. After all, who is in a better position to know what has been going on, i.e., the needs of the social security claimants and the economics of the attorney fee program, than the Judges themselves.

The Judge at the hearing observes the inquiry of counsel, hears the argument and generally observes the work performance of counsel. In addition, his performance is compared to the work of his peers.

One final item. If this fee approval procedure is shifted to the Regional Chief Judge, it would create an additional layer of government with additional costs and delays.

Sincerely,

Leonard E. Baloun

Leonard E. Baloun
President

Enc:

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

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PAST PRESIDENT

CHARLES N. BONO
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816-374-3756

CERTIFICATION

I, Ronald G. Bernoski, Secretary of The Association of Administrative Law Judges, hereby certify that the following Resolution was adopted by the Board of Directors of this Association at its July 1985 meeting in Washington, D.C..

"Whereas, The Association of Administrative Law Judges feels that fee authorizations are judicialy evaluated and the amounts authorized are commensurate with the services rendered;

Whereas, that the Administrative Law Judge is in the best position to act upon the petition to insure the highest degree of professional judgement in rendering fee determinations;

Whereas, there are adequate appellate procedures established for an aggrieved party who questions a fee authorization by an Administrative Law Judge;

Whereas, it is a worthy goal to reduce paperwork in government and report the same to the Vice-President's committee on paperwork;

Whereas, cost effectiveness in government is necessary;

Therefore, be it resolved, by the Board of Directors of The Association of Administrative Law Judges, Department of Health and Human Services, that for the reasons above stated, we respectfully request the Associate Commissioner of the Office of Hearings and Appeals to issue a directive allowing Administrative Law Judges to authorize fees without regard to monetary limitations and to continue the appellate rights for the affected persons as presently existing."

Dated this 1st day of May, 1987.

Ronald G. Bernoski
Ronald G. Bernoski
Secretary

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

LEONARD E. BALOUN
PRESIDENT

Association
8-439-6811
509-456-6811
Office
8-439-5353
509-456-5353

April 8, 1987

John H. Pickering, Chairman
Commission on Legal Problems
of the Elderly
American Bar Association
1666 K Street, N.W., 11th Floor
Washington, D.C. 20036

Dear Mr. Pickering:

First of all I enjoyed meeting you in person during the interval of the Associations Board Meeting. Second, the Association is honored by your request that we prepare a paper on the matter of attorney's fees.

Thomas Jefferson said, "I do not take a single newspaper, nor read one in a month, and I feel myself infinitely the happier for it."

I was not too pleased when the first item appeared in Jack Anderson's column a few months back. I asked myself two questions--"Who orchestrated the article" and "Why?" To this date, even after several additional articles, I do not know the definitive answers but can only surmise.

Dysinformation seems to be the course of what has come across my desk. The Inspector Generals report, which laid dormant in draft form for several months suddenly became final in January 1987. Reviews by Board members, prompted in part, the agenda item for the Board's consideration.

As I noted to you, there are serious considerations, arguments and interests on both sides. Hopefully, we will be able to address the expectations of all concerned.

Respectfully,

Leonard E. Baloun
Leonard E. Baloun
President

Enclosures

Room 830 North 214 Wall Street, Bon Marche Building Spokane Washington 99201

DOUGLAS H. BOSCO
1ST DISTRICT, CALIFORNIA

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AND TRANSPORTATION
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(707-445-2055)

March 17, 1987

Hon. Andrew Jacobs, Chairman
Subcommittee on Social Security
1101 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am enclosing for your reference a copy of a memorandum and accompanying documentation that I recently received from Administrative Law Judge, John H. Lawless, Jr. of San Rafael, California. As the enclosed materials explain, Judge Lawless is concerned about OHA's attempt to impose deadlines on the adjudication of disability and other Social Security claims. I am concerned about this potential problem as my constituents' Social Security claims are adjudicated by the San Rafael office.

Your consideration and review of the concerns raised here would be greatly appreciated. In addition, I respectfully request that the enclosed materials be entered into the Subcommittee's oversight files on this subject.

Thank you, in advance, for your consideration.

Cordially,

DOUGLAS H. BOSCO
Member of Congress

DHB:kl
Enclosure

MAR 2 1987

UNITED STATES GOVERNMENT

memorandum

DATE: February 27, 1987

REPLY TO ATTN OF: JOHN H. LAWLESS, JR., Administrative Law Judge, OHA, San Rafael, CA

SUBJECT: Your Memorandum dated 2/3/87 Regarding "AGED CASES"

TO: Stanley S. Sadur, Regional Chief Administrative Law Judge, OHA, Region IX

In response to your memo to me dated February 3, 1987 with respect to the above subject, I disagree with the "Aged Cases" concept set forth therein for the following reasons:

(1) Your attempt to enforce a "time frame" on Administrative Law Judges within which they must process a Social Security case from the date claimant files a request for hearing to the date of issuance of a decision is contrary to the decision of the United States Supreme Court in Heckler vs. Day (May 22, 1984) 104 S.CT. 2249 in which the Court rejected mandatory deadlines for adjudication of disability and other Social Security claims, holding that establishing mandatory deadlines was solely within the jurisdiction of Congress. Ironically, the Court upheld this position of the then Secretary of DHHS in this regard, noting that since 1975 Congress had repeatedly refused to impose statutory deadlines within which cases must be adjudicated, stating:

> "Certainly in Congress the concern that mandatory deadlines would jeopardize the quality and uniformity of agency decisions has prevailed over consideration of timeliness."

(2) Your attempt to mandate "time frames" in the adjudication of cases violates the Administrative Procedure Act which guarantees the independance of Administrative Law Judges throughout the government in the hearing and adjudication of cases.

(3) As indicated by the Supreme Court in the above noted decision, Congress is more concerned with the quality of our adjudications than with "timeliness" or "numbers" goals. Common sense and legal professionalism, phrases of little significance to administrators I have found, requires that in order to accord taxpayers and claimants in disability and other Social Security cases complete "due process" adjudications, the Administrative Law Judges should devote sufficient time to pre-hearing and post-hearing development of cases. I have found over the years that in more than 75% of my disability and other cases,

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REV 1-80
GSA FPMR 41 CFR 101-11.6
5010-114

claimants, generally through their attorneys or non-attorney representatives, request additional time after the hearing to submit updated medical reports and other pertinent documentary evidence. After this additional evidence is received and reviewed, I find that it is often necessary to hold a supplemental hearing to obtain the testimony of a medical advisor and/or vocational expert in order to fully evaluate the disability issues. Further, recent changes in the disability regulations, particularly those with respect to mental impairments, necessitates extensive use of psychiatric medical advisors, either at the original hearing or at a supplemental hearing. I find that most claimants, and their attorneys or non-attorney representatives, are supportive of these exhaustive adjudicatory procedures in order to guarantee that their claimants do in fact, receive a full and complete "due process" decision.

I realize that in recent years your growing administrative duties as the Regional Chief Administrative Law Judge have reduced your participation in the hearing process to the minimum, and you may not be aware of the growing complexities of the adjudication process. But I am certain that you agree with me and Congress that the first priority to all Social Security Administration claimants is the quality of the adjudication process and not the "speed" of the same.

(4) Further, as I found out during my twenty five years of small town law practice before coming to OHA in 1975, thoroughness in the development of law suits and other legal matters is essential to the ultimate quality of the end product. This has been proven true in the adjudication of OHA disability claims. During the past 10 years or so, the advent of increased agency pressures and "policies" for increased "numbers" of dispositions and "time limitations", as per your said "Aged Cases" memo, has resulted in the deterioration of the quality of disability adjudications in the eyes of the Federal Courts around the nation. As noted in the Social Security Operations Report dated September 30, 1984 and the 1985 OHA Fact Sheet, from the 1975 fiscal year to the 1984 fiscal year, reversals of OHA decisions by the United States District Courts increased from 19.1% to 61.6%. Although some of these reversals can be attributed to non-quality factors, such as statutory and regulatory changes in disability standards which effected pending cases on appeal following the OHA decision, it is the undersigned's opinion, as well as that of many other Administrative Law Judges in OHA, that because of the ongoing illegal administration policies and pressures for increased numbers of decisions and quicker processing of adjudications by the Administrative Law Judges, notwithstanding the increased complexity of the disability standards in recent years, there is a diminished credibility of the OHA Administrative determinations which must be corrected by the Courts. Obviously, this results in less than a "due process" adjudication to taxpayers and claimants at the administrative level, as well as cost increases to the Courts, OHA, the Social Security Administration and the Trust Fund. That you have totally ignored the adjudication quality concept is evident from your reply of October 10, 1986 to the inquiry of Judge Manion of this office dated August 20, 1986 with respect to the "processing time and aged cases" goals of the Associate Commissioner. You totally rejected the relevance of Judge Manion's reference to the problem of increased United States District Court remands and reversals of OHA decisions, stating: "If and when remands and the number of reversals becomes a goal (which I sincerely doubt), I would include such statistics".

In closing, I repeat that your memo of February 3, 1987 attempting to impose upon me and the other Administrative Law Judges in this Region "time frames" for the disposition of cases is clearly an attempt to interfere with the independence of the Administrative Law Judges accorded by the Administrative Procedure Act (5 USC 551 et. seq.) as well as the mandates of the United States Supreme Court set forth in Heckler vs. Day (supra) and the policies of Congress reported in said decision. Because of these Congressional concerns, I am forwarding copies of this response to Senators Alan Cranston and Pete Wilson, Congresswoman Barbara Boxer and Congressman Douglas Bosco, whose constituants constitute claimant's whose cases are adjudicated by this office. I would urge their referral of this problem to the appropriate Congressional committee or sub-committee for review.

John H. Lawless

JOHN H. LAWLESS, JR
Administrative Law Judge
OHA, San Rafael, CA

JHL:sb

Enclosures:
Heckler vs. Day decision
Your memo of February 3, 1987

cc:
Hon. Alan Cranston
Hon. Pete Wilson
Hon. Barbara Boxer
Hon. Douglas Basco
Paul Rosenthal, CALJ
Leonard Baloun, ALJ
President, Association of
Administrative Law Judges, Inc.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

MEMORANDUM
SOCIAL SECURITY ADMINISTRATION
Office of Hearings and Appeals
Region IX

DATE: February 3, 1987

FROM: Regional Chief Administrative Law Judge
OHA, Region IX

SUBJECT: Aged Cases - Over 270 Days Old - ACTION

TO: John H. Lawless, Jr., ALJ

Attached hereto is Region IX's Aged Case Report dated January 28, 1987. As the report indicates San Rafael has the highest percentage of aged cases in the region with 22.58 % of the cases in the office over 270 days old. The end of the month call in report indicates 18.5% aged cases in the office.

Our reports show that you have 47 aged cases in your docket. I'm sure that you are aware that between the high processing time in San Rafael (247 days for the period of July through December 1986) and your high number of aged cases, that claimant's are not getting the expedited service they deserve and that due process demands. One of the primary characteristics that a judge should seek to achieve is the ability to manage his case load. I urge you to review your docket, use your initative to complete the evidence and render timely dispositions.

As I do for the entire region I will be monitoring your progress in the area of aged cases.

Stanley S. Sadur
Stanley S. Sadur

not an adjudication as to whether individual class members are entitled to benefits thereunder. Hence, the class as defined by plaintiffs meets the legal-factual commonality requirement.

C. *Typicality of Claims*

"The typicality requirement refers to the nature of the representative's claim or defense and not to the specific facts from which it arose or to the relief sought." *Long v. Thornton Tp. High School District 205*, 82 F. R. D. 186, 190 (N. D. Ill. 1979). The test is whether the named plaintiffs' claim and that asserted on behalf of the class are "based on the same legal theory." *Id.* at 190. In this case plaintiffs challenge the Secretary's denial of benefits solely because of the application of the regulatory policies at issue here. The legal theory on behalf of the class is identical.

D. *Representativeness of Named Plaintiffs*

"Adequacy of representation depends on two factors: (a) the plaintiffs' attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the class." *Susman v. Lincoln American Corp.*, 561 F. 2d 86, 90 (7th Cir. 1977). In this case, plaintiffs' attorneys have repeatedly been found to be adequate class counsel. See, e. g., *Wright v. Califano*, 587 F. 2d 345 (7th Cir. 1978); *Jimenez v. Weinberger*, 523 F. 2d 689 (7th Cir. 1975). As to the second factor under Fed. R. Civ. P. 23(a)(4), the named plaintiffs have instituted this litigation to declare the Secretary's regulatory policies illegal and to enjoin their application. If the prayed for relief is granted, both the named and unnamed plaintiffs will benefit equally. The Secretary does not allege, nor does this Court find, any facts suggesting that plaintiffs' interest in the case is inconsistent with the interests of the class as a whole.

II. *Requisites Under Fed. R. Civ. P. 23(a)*

In addition to meeting the requirements of Fed. R. Civ. P. 23(a), a class action must qualify under one of the subsections of 23(b). The Secretary's regulatory policies challenged here affect equally all members of the class. Indeed, plaintiffs have defined the class by reference to the scope of the Secretary's policies at issue.

Thus, there is ample support for plaintiffs' assertion that the Secretary has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief with respect to the class as a whole appropriate. *Alliance to End Repression v. Rochford*, 565 F. 2d 975, 978 (7th Cir. 1977); *Dixon v. Quern*, 76 F. R. D. 617, 620 (N. D. Ill. 1977).

Conclusion

Plaintiffs have met their four-part burden under Fed. R. Civ. P. 23(a) for certification of a class action. The objections raised by defendant to numerosity and commonality of issues have been considered and rejected in the foregoing discussion. The remaining two prerequisites of 23(a), typicality of claims and representativeness of named plaintiffs have also been met. Furthermore, the requirements of Fed. R. Civ. P. 23(b)(2) are satisfied in that the Secretary's two eligibility policies are generally applicable to the proposed class, making appropriate injunctive and declaratory relief with respect to the class as a whole. Therefore, plaintiffs' motion for class certification is granted.

It is so ordered.

[¶ 15,307] **Heckler v. Leon S. Day *et al.*** United States Supreme Court. No. 82-1371, 5/22/84.

Syllabus

[Hearing by ALJ—Mandatory deadlines for adjudication of disability claims rejected—Establishing mandatory deadlines within province of Congress rather than judiciary.—Back references: ¶ 12,663.27, 12,675.]

The Social Security Act (Act) and implementing regulations provide a four-step process for the administrative review and adjudication of disputed disability benefit claims under Title II of the Act. First, a state agency determines whether the claimant has a disability and the date it began or ceased. Second, if the claimant is dissatisfied with that determination, he may request a *de novo* reconsideration and in some cases a full evidentiary hearing. Third, if the claimant receives an adverse reconsideration determination, he is entitled to an evidentiary hearing and *de novo* review by an administrative law judge. Finally, if the claimant is dissatisfied with the administrative law judge's decision, he may appeal to the Appeals Council of the Department of Health and Human Services (HHS).

Respondents brought an action in Federal District Court on behalf of a statewide class of claimants in Vermont, seeking declaratory and injunctive relief from delays encountered in steps two and three that allegedly violated their right under 42 U. S. C. § 405(b) (1976 ed., Supp. V) to a hearing within a reasonable time. Holding that delays of more than 90 days in making reconsideration determinations, and delays of more than 90 days in granting a hearing request, were unreasonable and violated claimants' statutory rights, the District Court issued an injunction in favor of the statewide class requiring the Secretary of HHS in the future to issue reconsideration determinations within 90 days of requests for reconsideration, to conduct hearings within 90 days of requests for hearings, and to pay interim benefits to any claimant who did not receive a reconsideration determination or hearing within 180 days of the request for reconsideration or who did not receive a hearing within 90 days of the hearing request. The Court of Appeals affirmed.

Held: The District Court's injunction constituted an unwarranted judicial intrusion into the pervasively regulated area of claims adjudication under Title II. The legislative history shows that Congress, in striking the balance between the need for timely disability determinations and the need to ensure the accuracy and consistency of such determinations in the face of heavy workloads and limited agency resources, has concluded that mandatory deadlines for adjudication of disputed disability claims are inconsistent with the Act's primary objectives. In light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have been contemplated that courts should have authority to impose judicially the very deadlines Congress repeatedly has rejected. Pp. 6-14.

685 F. 2d 19, vacated and remanded.

[The decision of the U. S. Court of Appeals, Second Circuit, was reported at ¶ 14,156, 1982-1983 CCH UNEMPLOYMENT INSURANCE REPORTS.]

POWELL, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, REHNQUIST and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

ON WRIT OF CERTIORARI TO THE UNITED STATES COUT OF APPEALS FOR THE SECOND CIRCUIT

JUSTICE POWELL delivered the opinion for the Court.

The question presented is the validity of an injunction issued on behalf of a statewide class that requires the Secretary of Health and Human Services to adjudicate all future disputed disability claims under Title II of the Social Security Act, 42 U. S. C. § 401 *et seq.*, according to judicially established deadlines and to pay interim benefits in all cases of noncompliance with those deadlines.

I [*Background*]

Title II of the Social Security Act [Act] was passed in 1935. 49 Stat. 622, as amended 42 U. S. C. § 401 *et seq.* (1976 ed. and Supp. V). Among other things, it provides for the payment of disability insurance benefits to those whose disability prevents them from pursuing gainful employment. 42 U. S. C. § 423.[1] Disability benefits also are payable under the Supplemental Security Income [SSI] program established by Title XVI of the Act, 76 Stat. 197, *as amended*, 42 U. S. C. § 1381 (1976 ed and Supp. V). The disability programs administered under Titles II and XVI "are of a size and extent difficult to comprehend." *Richardson v. Perales*, 402 U. S. 389, 399 (1971). Approximately two million disability claims were filed under these two titles in fiscal year 1983.[2] Over 320,000 of these claims must be heard by some 800 administrative law judges each year.[3] To facilitate the orderly and sympathetic administration of the disability program of Title II, the Secretary and Congress have established an unusually protective four-step process for the review and adjudication of disputed claims. First, a state agency determines whether the claimant has a disability and

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[1] Section 423(d) defines "disability" as:

"(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

Any disability benefits payable under § 423 are paid out of the Federal Disability Insurance Trust Fund, which is funded by payroll taxes. 42 U. S. C. § 401(b) (Supp. V).

[2] Social Security Administration Annual 1983 Report to Congress 43-44 (1983).

[3] Office of Hearing & Appeals, *Key Workload Indicators* 1, 16 (May 1983) [hereinafter *Key Workload Indicators*]. In May 1983, the average number of cases pending per administrative law law judge stood at a record 221. *Id.*, at 1.

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the date the disability began or ceased.[4] 42 U. S. C. § 42(a), 20 CFR § 404.1503 (1983). Second, if the claimant is dissatisfied with that determination, he may request reconsideration of the determination. This involves a de novo reconsideration of the disability claim by the state agency, and in some cases a full evidentiary hearing. *Id.*, §§ 404.907-404.921. Additional evidence may be submitted at this stage, either on the request of the claimant or by order of the agency. Third, if the claimant receives an adverse reconsideration determination, he is entitled by statute to an evidentiary hearing and to a de novo review by an Administrative Law Judge [ALJ]. 42 U. S. C. § 405(b) (Supp. V); 20 CFR §§ 404.929-404.961 (1983). Finally, if the claimant is dissatisfied with the decision of the ALJ, he may take an appeal to the Appeals Council of the Department of Health and Human Services [HHS].[5] *Id.*, §§ 404.967-404.983. These four steps exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court. 42 U. S. C. § 405(g).

In this class action, the named plaintiffs sought declaratory and injunctive relief from delays encountered in steps two and three above. The action was initiated by Leon Day in November 1978 after his disability benefits were terminated and he suffered substantial delays in obtaining a reconsideration determination and in securing a hearing before an ALJ.[6] After suffering similar delays, Amedie Maurais intervened in the action.[7] On June 14, 1979, the District Court certified a statewide class consisting of:

> All present and future Vermont residents seeking to secure Social Security disability benefits who, following an initial determination by the defendant that no disability exists, experience an unreasonable delay in the scheduling of and/or issuance of decisions in reconsiderations and fair hearings. App. to Pet. for Cert. 12a, n. 1.

Plaintiffs argued before the District Court that the delays they had experienced violated their statutory right under 42 U. S. C. § 405(b) (Supp. V) to a hearing within a reasonable time.[8] Both parties submitted the case to the District Court on motions for summary judgment. On the basis of the undisputed evidence, the District Court held that, as to all claimants for Title II disability benefits in Vermont, delays of more than 90 days from a request for hearing before an ALJ to the hearing itself were unreasonable.[9] It granted partial summary judgment to the plaintiff class on that issue in December 1978.

After the submission of additional evidence, the District Court considered motions for summary judgment concerning the reasonableness of delays in the reconsideration process. The additional evidence also was undisputed. It consisted of factual summaries of 77 randomly selected disability cases submitted by the Secretary. The District Court noted that the "summaries support the positions of both parties. They show the reconsideration process is often time consuming and complex. They also show that the process is replete with unexplained delay; other requests are processed with commendable dispatch." App. to Pet. for Cert. 25a. In 27 of the 77 cases, reconsideration determinations took longer than 90 days. In each of these 27, the District Court concluded that the delays were caused by agency inefficiencies and were not justified by the "necessary steps in the reconsideration process." App. to Pet. for Cert. 28a. On the basis of this survey, the District Court concluded that, as a rule, delays of more than 90 days in making reconsideration determinations were unreasonable and violated the claimant's statutory rights.[10] In August 1981, the District Court granted summary judgment for respondents on the reconsideration aspect of the case.

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[4] The state agency acts under the authority and control of the Secretary. See 42 U. S. C. § 421(a).

[5] New material evidence may be submitted to the Appeals Council. The Council then reviews all the evidence and will reverse the ALJ's determination only if it finds that the determination is "contrary to the weight of the evidence currently in the record." 20 CFR § 404.970(b) (1983).

[6] Day was forced to wait 167 days for a reconsideration determination. He received a hearing before the ALJ 173 days after his hearing request. App. to Pet. for Cert. 13a-14a.

[7] Maurais waited 215 days for a reconsideration determination after his disability benefits were terminated. He was given a hearing before an ALJ 85 days after his request. App. to Pet. for Cert. 14a.

[8] That section provides that after any unfavorable determination of disability, the claimant, on request, shall be entitled to "reasonable notice and opportunity for a hearing with respect to such decision."

[9] The evidence submitted by the government showed that 57% of the hearings requested in Vermont after January 1978 were scheduled within 90 days, with a range of delays varying between two and nine months. App. to Pet. for Cert. 15a. The District Court rejected the Secretary's claim that the delays were necessary to ensure quality decisions and to protect the limited resources of the Social Security program. It held that "[w]hile the SSA has made admirable strides in reducing the average length of delay experienced by claimants a few years ago, we [believe] . . . that the SSA is not warranted in forcing claimants to endure such lengthy delays without benefits, while it puts its administrative appeals process in order." App. to Pet. for Cert. 17a-18a.

In November 1981, the District Court issued an injunction in favor of the statewide class that "ordered and directed [the Secretary] to conclude reconsideration processing and issue reconsideration determinations within 90 days of requests for reconsideration made by claimants."[11] The injunction also required ALJs to provide hearings within 90 days after the request is made by claimants.[12] Finally, it ordered payment of interim benefits to any claimant who did not receive a reconsideration determination or hearing within 180 days of the request for reconsideration or who did not receive a hearing within 90 days of the hearing request.[13] The Court of Appeals for the Second Circuit affirmed the District Court's determination that the challenged delays violated the statute and upheld the District Court's remedial order. *Day v. Schweiker*, 685 F. 2d 19 (CA2 1982). We granted certiorari to consider whether it is appropriate for a federal court, without statutory authorization, to prescribe deadlines for agency adjudication of Title II disability claims and to order payment of interim benefits in the event of noncompliance. — U. S. — (1983).[14] We conclude that the legislative history makes clear that Congress, fully aware of the serious delays in resolution of disability claims, has declined to impose deadlines on the administrative process. Accordingly, we reverse the judgment below.

II [*Secretary's Position*]

The Secretary does not challenge here the determination that § 405(b) requires administrative hearings to be held within a reasonable time. Nor does she challenge the District Court's determination that the delays encountered in the cases of plaintiffs Day and Maurais violated that requirement.[15] She argues only that a statewide injunction that imposes judicially prescribed deadlines on HHS for all future disability determinations is contrary to congressional intent and constitutes an abuse of the court's equitable power. She argues in the alternative that even if the injunction is appropriate, the order requiring payment of interim benefits in cases of noncompliance is not. The Secretary looks primarily to legislative history to support both arguments.

A [*Congressional Decision*]

The Secretary correctly points out that Congress repeatedly has been made aware of the long delays associated with resolution of disputed disability claims and repeatedly has considered and expressly rejected suggestions that mandatory deadlines be imposed to cure that problem.[26] She argues that Congress expressly has balanced the need for timely disability determinations against the need to ensure quality decisions in the face of heavy and escalating workloads and limited agency resources. In striking that balance, the Secretary argues, the relevant legislative history also shows that Congress to date has determined that mandatory deadlines for agency adjudication of disputed disability claims are inconsistent with achievement of the Act's primary objectives, and that the District Court's statewide injunction flatly contradicts that legislative determination. We find this argument persuasive.

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[10] There is no express statutory requirement that reconsideration determinations be conducted within a reasonable time. The District Court reasoned, however, that because the reconsideration determination was an "administrative prerequisite" to an administrative hearing, "[u]nreasonable delays in the reconsideration procedures trench on the statutory duty to provide a hearing within a reasonable time." App. to Pet. for Cert. 27a. That reasoning is not challenged here.

[11] The order exempted reconsideration determinations from the 90-day deadline in the following circumstances:

(a) The claimant offers new medical evidence or reports new medical treatment since his initial determination;

(b) The claimant agrees to undergo a consultative examination when one is suggested by the defendant;

(c) The claimant or his representative causes a delay by failing to provide information needed for reconsideration;

(d) The claimant or his representative requests a delay; or,

(e) The delay is in some other way attributable to the aggrieved claimant or his representative.

App. to Pet. for Cert. 33a.

[12] The order exempted hearing requests from the 90-day deadline in the following circumstances:

(a) The claimant or his representative causes a delay by failing to provide information needed for adjudication;

(b) The claimant or his representative request a delay;

(c) The claimant or his representative fails to appear for the scheduled hearing[;]

(d) The delay is in some other way attributable to the claimant or his representative.

App. to Pet. for Cert. 34a.

[13] Because the District Court held that the challenged delays violated § 405(b) of the Act, it did not reach plaintiffs' claims that the delays violated the Administrative Procedure Act or their due process rights under the Fourteenth Amendment.

[14] We note at the outset that the District Court had jurisdiction to consider respondents' statutory claim under 42 U. S. C. § 405(g). There are two prerequisites to § 405(g) jurisdiction. *Mathews v. Eldridge*, 424 U. S. 319, 328 (1976); *Weinberger v. Salfi*, 422 U. S. 749, 763-767 (1975). The non-waivable jurisdictional requirement that a claim for benefits shall have been presented to the Secretary has been met here. The jurisdictional requirement that administrative remedies be exhausted is waivable. In the present case, the Secretary has not challenged the sufficiency of respondents' efforts to exhaust administrative remedies. We interpret this to be a waiver by the Secretary of the exhaustion requirement under § 405(g). See *Salfi*, 422 U. S., at 767.

[15] Nor do we understand the Secretary to dispute the District Court's determination that the 27 sample cases it studied evidenced statutory violations of the reasonableness requirement.

Congressional concern over timely resolution of disputed disability claims under Title II began at least as early as 1975.[27] It has inspired almost annual congressional debate since that time.[28] The consistency with which Congress has expressed concern over this issue is matched by its consistent refusal to impose on the Secretary mandatory deadlines for resolution of disputed disability claims.

In 1975, the House Social Security Subcommittee held hearings on the delays encountered in resolving disputed Social Security claims,[29] and sixty members of the House sponsored a bill imposing statutory deadlines for each step in the administrative review of disputed SSA claims.[30] Expressions of concern were voiced in both the Senate and the House over the "huge backlog of some 103,000 cases awaiting hearing" before an ALJ. S. Rep. No. 94-550, p. 3 (1975); accord H. R. Rep. No. 94-679, pp. 1-2 (1975).[31] Despite this concern, the Staff of the House Subcommittee advised against statutory deadlines because of the potential "adverse effect on the quality and uniformity of disability adjudication which is already somewhat suspect." Staff of the Subcomm. on Social Security of the House Comm. on Ways & Means, 94th Cong., 1st Sess., *Appeals Process: Areas of Possible Administrative or Legislative Action* 1-2 (Comm. Print 1975) [hereinafter 1975 Staff Report].[32] Congress agreed and refused to impose statutory deadlines on the Secretary.

Bills proposing statutory deadlines have been proposed almost annually since 1975,[33] and congressional concern over the delay problem has remained high. For example, in 1980 Congress directed the Secretary to submit a report recommending the establishment of appropriate and realistic deadlines for resolution of disputed SSA claims. It ordered the Secretary in doing so to consider "both the need for expeditious processing of claims for benefits and the need to assure that all such claims will be thoroughly considered and accurately determined." Pub. L. 96-265, 94 Stat. 458, note following 42 U. S. C. § 401 (Supp. V). The Senate Report explained that "Congress could then evaluate the recommendations for consistency with the elements it wishes to emphasize and, if needed, take further action next year." S. Rep. No. 96-

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[26] The delays are not a recent development. In fiscal year 1973, the median time between hearing request and post-hearing disposition was 174 days. The mean processing time reached a high in fiscal year 1976 at 288 days. At the time this action was filed in district court (November 1978), the mean processing time was 151 days. *Key Workload Indicators* 1. As the District Court observed, "the [Secretary] has made admirable strides in reducing the average length of delay experienced by claimants a few years ago." See n. 9, *supra*.

[27] See Delays in Social Security Appeals: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways & Means, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Hearings].

[28] See, *e. g.*, Disability Insurance Program: Public Hearings Before the Subcomm. on the Social Security of the House Comm. on Ways & Means, 94th Cong., 2d Sess., 341-343 (1976); Administrative Law Judges, HEW Executive Level Positions, and Salary Adjustment for Director of Office of Management & Budget: Hearings Before the Subcomm. on Employee Ethics and Utilization of the House Comm. on Post Office & Civil Service, 95th Cong., 1st Sess. 10-11, 16-17 (1977); Disability Insurance Program—1978: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways & Means, 95th Cong., 2d Sess. 15-17, 97-99 (1978).

[29] See 1975 Hearings.

[30] H. R. 5276, 94th Cong., 1st Sess. (1975). That bill proposed the following deadlines: 90 days for an initial determination of eligibility; 90 days for a reconsideration determination; 120 days from hearing request to post-hearing decision; and 120 days for a decision by the Appeals Council.

[31] By the end of fiscal year 1975, there was a backlog of 111,169 cases, and a mean processing time of 262 days from hearing request to post-hearing decision. *Key Workload Indicators* 1.

[32] The concern was expressed throughout the House hearings that mandatory deadlines would worsen the situation of an already overburdened staff, thereby jeopardizing the quality of agency decisions. See, *e. g.*, 1975 Hearings 8 ("Equally important as speed of processing of cases, is the question of the quality of adjudication"); *id.*, at 17 ("Heavier work loads and efforts to increase individual ALJ production place more strain on quality of adjudication").

[33] See H. R. 12486, 94th Cong., 2d Sess. (1976); H. R. 8151, 95th Cong., 1st Sess. (1977); H. R. 767, 10672, 95th Cong., 2d Sess. (1978); H. R. 4775, 97th 96th Cong., 1st Sess. (1979); H. R. Cong., 1st Sess. (1981).

408, p. 59 (1979).[illegible] The Secretary submitted a report in October 1980, suggesting deadlines of 150 days for reconsideration determinations and 165 days from hearing to post-hearing decision, both subject to certain exceptions. Report of the Department of Health & Human Services 1 (October 21, 1980). The Secretary, however, cautioned Congress that budget and staff limitations and burgeoning workloads "mitigate against the Department meeting its proposed time limitation objectives in every instance." *Id.*, at 2. Since receiving the Secretary's report, Congress has refused to impose mandatory deadlines on the Secretary, or to direct her to promulgate them herself.

Certainly in Congress the concern that mandatory deadlines would jeopardize the quality and uniformity of agency decisions has prevailed over considerations of timeliness. In its most recent comment on the subject, the House Committee on Ways and Means expressly disapproved mandatory hearing deadlines and indicated disagreement with recent judicial decisions imposing such time restrictions. Criticizing the decision in *Blankenship v. Secretary of HEW*, [1976-1977 CCH UNEMPLOYMENT INSURANCE REPORTS, ¶ 14,739] No. C75-0185L(A) (W. D. Ky. May 6, 1976), which had imposed judicially prescribed hearing deadlines on the Secretary and ordered the payment of interim benefits in the event of noncompliance,[illegible] the Committee reported:

> [The] Committee believes that a disability claimant is entitled to a timely hearing and decision on his appeal, but it also recognizes that the time needed before a well-reasoned and sound disability hearing decision can be made may vary widely on a case-by-case basis. . . . Establishing strict time limits for the adjudication of every case could result in incorrect determinations because time was not available to . . . reach well-reasoned decisions in difficult cases. H. R. Rep. No. 97-588, pp. 19-20 (1982).[illegible]

Finally, the Secretary points out that judicially imposed deadlines may vary from case to case and from state to state, requiring HHS to shuffle its staff nationwide. Not only would this tend seriously to disrupt agency administration, but wide variations in judicially imposed deadlines also would prevent realization of Congress' oft-repeated goal of uniform administration of

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[illegible] In requesting recommendations from the Secretary, Congress faced opposition from those who continued to press for statutory deadlines. See Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways & Means, 96th Cong., 1st Sess., 114 (1979) (Statement of Dennis M. Sweeney & Laura W. S. Macklin on Behalf of the Administrative Law Center, etc.) ("[T]he problem of delays in the Social Security hearing system has been before Congress repeatedly and for a number of years. . . . At this point, HEW is well aware of the problems in this area. . . . [W]e respectfully submit that this is not the time to further study the delay problem. A provision in this bill suggesting a study from HEW . . . can only be read as an invitation to further delay cleaning up the hearing process and getting rid of the unreasonable and unnecessary delays").

[illegible] The District Court's original unpublished memorandum opinion required the Secretary to comply with a hearing request within 90 days. The Court of Appeals for the Sixth Circuit reversed that order and remanded for the Secretary to issue regulations promulgating mandatory deadlines. *Blankenship v. Secretary of HEW*, 587 F. 2d 329 (CA6 1978). On remand, the Secretary attempted to promulgate such regulations, but concluded that unpredictable caseloads made deadlines impossible. The Secretary then petitioned the District Court for relief from the requirement that she promulgate deadlines. The District Court refused and ordered the Secretary to promulgate the regulations. *Blankenship v. Secretary of Health & Human Services*, 532 F. Supp. 739 (WD Ky. 1982). The Sixth Circuit affirmed on appeal. *Blankenship v. Schweiker*, [1A CCH UNEMPLOYMENT INSURANCE REPORTS, ¶ 15,028] Nos. 82-5130, 82-5204 (December 1, 1983). Justice O'Connor has stayed the District Court's order requiring the Secretary to promulgate regulations pending our decision in this case. *Heckler v. Blankenship*, [1A CCH UNEMPLOYMENT INSURANCE REPORTS, ¶ 15,082] — U. S. — (1984).

[illegible] This clear expression of congressional disapproval refutes the dissent's suggestion that Congress implicitly has endorsed judicially mandated deadlines by failing to repudiate those judicial decisions that have imposed them. See *post*, at 7. There is simply no basis for the dissent's proposition that this passage "when read in context, supports only the inference that Congress chose not to 'assert its power to give the district court's more specific direction.'" *Post*, at 8, n. 9 (quoting *White v. Mathews*, 559 F. 2d 852, 861 (CA2 1977), cert. denied, 435 U. S. 906 (1978)).

A 1981 Committee Staff Report recommended that quality should no longer be sacrificed for promptness:

"Back in 1975, [the SSA] gave lip service to quality, worrying primarily about processing time and case backlog.

. . . .

"Beginning in 1978, the Subcommittee examined in some depth two State agencies—New York and New Jersey—which were expediting cases at the expense of quality with the tacit consent of SSA's Regional Office in New York. Their operations have still not fully recovered. . . . One of the recommendations made by the Social Security Administration . . . was that the State adjudicators 'should be reminded that (1) the goal of adjudication quality takes precedence over that of expeditious processing and (2) that adjudicators should use whatever time is necessary to secure essential medical evidence.'" Staff of the Subcomm. on Social Security of the House Comm. on Ways & Means, 97th Cong., 1st Sess., Status of the Disability Insurance Program 12-13 Comm. Print (1981).

the Act. See, *e g.*, S. Rep. No. 96-408, pp. 52-56 (1979) (emphasizing concern over "state-to-state" variations and expressing hope that current legislation would "both improve the quality of determinations and ensure that claimants throughout the Nation will be judged under the same uniform standards *and procedures*") (emphasis added).[illegible]

B [*1980 and 1982 Legislation*]

Legislation enacted by Congress in 1980 and 1982 is fully consistent with the repeated rejection of proposals for mandatory deadlines and with efforts by Congress to ensure quality and uniformity in agency adjudication. In 1980, Congress amended § 405(b) to require that every initial determination of ineligibility contain an easily understandable discussion of the evidence and the reasons for the determination. Pub. L. 96-265, 94 Stat. 457, 42 U. S. C. § 405(b) (Supp. V). At the same time, Congress added § 421(h) to require a tri-annual assessment of the continuing eligibility of recipients of disability benefits. Pub. L. 96-265, 94 Stat. 460, 42 U. S. C. § 421(h) (Supp. V). Congress also included in the 1980 amendments a requirement that the Secretary review at least 65% of all determinations of eligibility made by state agencies in any fiscal year after 1982. Pub. L. 96-265, 94 Stat. 456, 42 U. S. C. § 421 (c)(2), (3) (Supp. V).[illegible] Before 1972, the Secretary had reviewed the majority of state determinations as a matter of course. A growing workload required the Secretary to abandon this practice for a sample review of only 5% of the state agency determinations. H. R. Rep. No. 96-100, p. 10 (1979). The 1980 amendment, requiring review of a substantially higher percentage of state agency disability determinations, presumably will have an effect on the timely resolution of disputed disability claims.[illegible]

Finally, in 1982 Congress provided that effective January 1, 1984, an initial determination that previously granted disability benefits should be terminated entitles the claimant not only to a de novo review on reconsideration, but to a full evidentiary hearing as well. Pub. L. 97-455, 96 Stat. 2499, 42 U. S. C. § 405(b)(2). All of these changes will impose additional duties on the Secretary and her heavily burdened staff. In light of Congress' continuing concern that mandatory deadlines would subordinate quality to timeliness, and its recent efforts to ensure the quality of agency determinations, it hardly could have contemplated that courts should have authority to impose the very deadlines it repeatedly has rejected.[illegible]

C [*SSI Deadline Noted*]

Persuasive evidence of the intention of Congress also is found in the distinction it has made between the resolution of SSI claims for old-age and survivor benefits and SSI claims for disability benefits. Section 405(b), governing eligibility determinations under Title II, and § 1383(c)(1), governing eligibility determinations under Title XVI, are virtually identical. In the event of adverse determinations, both require the Secretary to provide claimants with "reasonable notice and opportunity for a hearing." In the case of disputed SSI claims, however, § 1383(c)(2) requires a post-hearing decision within 90 days of the hearing request, except in the case of disputed disability claims. This provision makes two things clear: (i) Congress will establish hearing deadlines when it deems them appropriate; and, (ii) Congress has determined that it is inappropriate to subject disputed disability claims to mandatory deadlines.[illegible]

[illegible] The dissent's suggestion that Congress meant to prohibit only nationwide and not statewide deadlines is unpersuasive. The legislative history suggests no distinction between the two. Moreover, injunctive orders imposing varying deadlines from state to state would defeat the express congressional goal of uniformity. See S. Rep. No. 96-408, 52-56 (1979).

[illegible] The 1980 amendments also authorized the Secretary to review determinations of ineligibility on her own motion. 42 U. S. C. § 421(c)(1).

[illegible] The legislative history of this amendment suggests that Congress was concerned that un- [illegible] resolution of disputed claims had resulted in a marked loss of quality and uniformity in agency decisions. See, e. g., S. Rep. No. 96-408, pp. 52-56 (1979).

[illegible] The suggestion made by the dissent that this legislative history "has little relevance to the task before us," *post*, at [illegible], is mistaken. The legislative history set forth in this opinion demonstrates far more than simple congressional inaction in the face of acknowledged delays; it explicitly shows that Congress has rejected repeated demands for mandatory deadlines. We rarely see as clear an expression of congressional intent.

[illegible] As early as 1967, Congress recognized the difference between old-age and disability claims: "The process of making disability determinations is significantly different from the retirement and survivors insurance claims process. In the disability process[,] State vocational rehabilitation agencies are involved importantly in the making of the decision[,] and in the borderline cases[,] lengthy and extensive development of facts of a medical nature is often required." S. Rep. No. 744, 90th Cong., 1st Sess. 107 (1967).

..III [*Mandatory Deadline Rejected*]

The Secretary also contends that quite apart from the congressional rejection of the mandatory deadlines discussed above, the District Court's order unduly intruded upon the discretion with which Congress has granted the Secretary to adopt rules and procedures for the adjudication of claims. See *Heckler v. Campbell*, 103 S. Ct. 1952, 1957, (1983); *Schweiker v. Gray Panthers*, 453 U. S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U. S. 413, 425 (1977). We need not reach this broader contention, however, because of repeated congressional rejection of the imposition of mandatory deadlines on agency adjudication of disputed disability claims.[illegible] In light of the unmistakable intention of Congress, it would be an unwarranted judicial intrusion into this pervasively regulated area for federal courts to issue injunctions imposing deadlines with respect to future disability claims.[illegible] Accordingly, we vacate the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.[illegible]

It is so ordered.

[Dissenting Opinion]

Justice MARSHALL, with whom Justice BRENNAN, Justice BLACKMUN, and Justice STEVENS join, dissenting.

This case determines an issue of vital importance to the Social Security Administration, to disabled Vermont residents, and to federal courts. By failing to ground its opinion in the factual record of the case at hand, the majority has discarded a balanced remedy crafted to effectuate a federal statute. Far from intruding clumsily into a pervasively regulated area, *ante*, at 15, the District Court fashioned a meaningful, carefully-tailored statewide remedy that mandated feasible, expeditious reconsideration determinations and hearings, that did not cause extra cost to the Secretary or reallocation to Vermont of resources from other States, and that did not harm other statutory goals such as quality and accuracy of decision-making. Because that remedy is not expressly or impliedly prohibited by the Constitution or by statute, and is not an abuse of discretion, I would affirm the judgment of the Court of Appeals.

I

A [*Relief Entitlement not at Issue*]

As the majority opinion makes clear, the District Court's declaratory judgment that the plaintiff class is entitled to relief is not at issue. The Secretary concedes that 42 U. S. C. § 405(b) compels her to provide claimants a hearing on disputed disability determinations within a reasonable time. Cf., *e. g.*, *White v. Mathews*, 559 F. 2d 852, 858 (CA2 1977), cert. denied, 435 U. S. 908 (1978). The Secretary does not contest the District Court's conclusion that, because under the Secretary's regulations a hearing must be preceded by a reconsideration determination, *see ante*, at 2, such reconsiderations must also be completed within a reasonable time. The undisputed factual record, submitted primarily by the Secretary herself, supports the District Court's declaratory judgment that the Secretary had failed to fulfill her statutory duty to provide the class representatives and a large portion of the plaintiff class reconsideration determinations and hearings within reasonable periods of time. While the Secretary challenges class-wide relief, she has not challenged the District Court's certification of the plaintiff class. Our review, therefore, is limited to the equitable remedy crafted by the District Court and affirmed by the Court of Appeals.

B. [*Background*]

A fair assessment of the validity of the District Court's order requires a clear view

---

[illegible] In view of Congress's unequivocal determination that mandatory deadlines are inappropriate, the repeated references in the dissenting opinion to the "reasonableness" of the injunctive order at issue here are simply irrelevant. See post, at 8, n. 1, 13-14, 15-16. The dissent states that the injunction at issue is "narrowly crafted," and assumes that the Secretary would have no difficulty complying with it. Even if this assumption were correct, it hardly suggests that this Court should disregard the considered determination of Congress that mandatory deadlines are inappropriate.

[illegible] We make clear that nothing in this opinion precludes the proper use of injunctive relief to remedy individual violations of § 405(b). Our decision in this case is limited to the question whether, in view of the unequivocally clear intent of Congress to the contrary, it is nevertheless appropriate for a federal court to prescribe mandatory deadlines with respect to the adjudication of disability claims under Title II of the Act. We understand that the courts below were moved by long delays that well may have caused serious deprivations. But this does not justify imposing absolute periods of limitations applicable to all claims—limitations that Congress repeatedly has declined to enact.

[illegible] The District Court's order requiring the payment of interim benefits was conditioned on noncompliance with the injunction. Because we have held that the injunction is invalid, we need not address the propriety of that part of the District Court's order requiring payment of interim benefits.

DOUGLAS H. BOSCO
1ST DISTRICT, CALIFORNIA

COMMITTEES
PUBLIC WORKS
AND TRANSPORTATION
MERCHANT MARINE
AND FISHERIES

Congress of the United States
House of Representatives
Washington, DC 20515

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THE EUREKA INN
SUITE 216
7TH AND F STREETS
EUREKA, CA 95501
(707-445-2055)

21 May 1987

Joseph K. Dowley, Chief Counsel
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth HOB
Washington, D.C. 20515

Dear Mr. Dowley:

I am submitting testimony from five attorneys in my Congressional District for inclusion in the record of the hearing on attorneys' fees in social security disability cases that was held on May 13, 1987.

I would also like to take this opportunity to express my concerns regarding the process by which the Social Security Administration reviews and approves payment of fees to representatives of social security disability claimants. As I expressed in my testimony for the hearing in April, 1986, delays and procedural barriers in this process act as a disincentive to attorney representation. In many cases, the claimants are unable to effectively represent themselves, and the assistance of a knowledgeable representative can be crucial to maximize the validity of the claim.

My constituents are finding it increasingly difficult to secure attorney representation for their social security disability claims. As this difficulty increases, the public's perception of the social security disability process as an "adversarial" process correspondingly increases. This was not the intent of Congress in establishing the disability program. It is my hope that the process can be made simpler and fairer for the claimants and their representatives.

Thank you for your attention to this material.

Cordially,

DOUGLAS H. BOSCO
Member of Congress

DHB:pb
Enclosures

MAR 27 1987

IRA S. BLATT
ATTORNEY AT LAW

494 H Street · P O Box 1164 · Arcata, California 95521
(707) 822 4802

March 25, 1987

Honorable Douglas H. Bosco
Federal Building
777 Sonoma Ave., Suite 329
Santa Rosa, CA 95404

RE: Attorney's Fees
in Social Security &
S.S.I. Cases

Dear Congressman Bosco:

I am writing to you, again, to solicit your help concerning my problem with the Social Security administration.

I have recently learned that Social Security is attempting to discourage attorneys from representing claimants by increasing the difficulty in having fees approved.

Enclosed is a copy of the most recent letter that I have received from N.O.S.S.C.R. regarding attorney's fees.

If claimants are unable to hire attorneys on a contingent fee basis, they will go unrepresented. The more difficult Social Security makes it for claimants to find representation, the fewer attorneys there will be to represent claimants.

If you need any further documentation of these problems, please do not hesitate to contact me.

Very truly yours,

IRA S. BLATT

ISB:bc
cc: Roy Schoenberg
A.A.L.
Michael Golden
Fred Neighbor
Steve Gompertz
John Faulkner

Enclosure

APR 9 1987

STEVEN GOMPERTZ
ATTORNEY AT LAW
1642 G. ST
ARCATA, CALIFORNIA 95521

(707) 822-1611

March 31, 1987

Congressman Douglas Bosco
Federal Building
777 Sonoma Avenue, Suite 329
Santa Rosa, CA 95404

Re: Attorney's Fees in Social Security and SSI Cases

Dear Congressman Bosco:

I have received a copy of Ira Blatt's letter to you of March 25. I wish to join him in seeking your assistance in this matter. Approximately one-half of my practice is Social Security matters and I attempt to represent my clients as diligently as possible. Also, I make a serious effort to keep my fees reasonable and rarely do I charge the full 25% of back benefits which is a typical fee. However, I do not see how I can continue to represent claimants if Social Security attempts to limit fees to $75.00 per hour as was indicated in Mr. Blatt's transmittal. $75.00 is my usual hourly rate on non-contingent matters, and is probably one of the lowest rates in Humboldt County, where fees are lower than those in San Francisco. Since Social Security matters are contingent, and I represent many claimants where I receive no fee, I generally request fees in the range of $125.00 per hour in those cases in which I am successful.

The situation is hard enough when Social Security delays as long as it does after their benefits have been received, but if a reasonable fee is also not available, I and other practitioners will have to drop out of the field.

I sincerely hope you will assist in resolving this matter.

Yours sincerely,

STEVEN GOMPERTZ

SG:lkm

cc: Ira Blatt

RON GREEN
ATTORNEY AT LAW
P O BOX 1110
16225 MAIN STREET
LOWER LAKE, CALIFORNIA 95457
(707) 994-6655

May 20, 1987

Joseph K. Dowley, Chief Counsel
Committee on Ways and Means
U.S. House of Representatives
Room 1102, Longworth House Office Bldg.
Washington, D.C. 20515

re: **ATTORNEY FEES IN SOCIAL SECURITY DISABILITY CASES**

Dear Mr. Dowley:

This is written to protest Associate Commissioner Eileen Bradley's recent policies that clearly undermine the right of social security claimants to obtain legal representation. Ms. Bradley recently unilaterally amended the regulations concerning approval of fee petitions so that now the administrative law judges deciding the cases can only authorize fees up to $1,500 instead of the $3,000 limitation which existed before Ms. Bradley's action.

Under this new policy, all fee petitions in excess of $1,500 are transferred to the office of one of the ten Regional Chief Administrative Law Judges. At that Regional Office, the fee will now be essentially set by a non-attorne adjudicator who was not present at the hearing, did not observe the attorney's work, did not hear the oral testimony, and did not render the decision in favor of the claimant.

The March 31, 1987 memorandum issued by Associate Commissioner Bradley did not limit fees to $75 per hour, but there was some discussion about the unrelated Equal Access to Justice Act standard of $75 per hour. My own experiences in two recent cases in which my fee petitions were sent to the Regional Chief ALJ in San Francisco certainly are quite alarming. It appears clear that the Office of the Regional Chief ALJ in San Francisco is now working on the assumption that they should not approve fees except if they are approximately $75 per hour. In one recent case I submitted a fee petition for an amount which was less than the 25% contingent fee agreement and which came to $162.50 per hour. Please bear in mind that there would have been 32 hours spent for no fee on this case if a favorable decision had not been issued. Regional Chief Administrative Law Judge Stanley S. Sadur approved a fee of only $72 per hour. In another recent case, I requested a fee of $1,804.80 which amounted to $93 per hour and this fee was also cut by the Regional Chief Administrative Law Judge to $80 per hour. In both cases, the Administrative Law Judges that decided the cases supported my fee request but could not approve my request since they were beyond their new limit of $1,500.

The Equal Access to Justice Act standard of $75 per hour is totally irrelevant to social security disability administrative hearings. Besides, the Equal Access to Justice Act provides for $75 per hour **"unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."** 28 U.S.C. §2412(d)(2)(A).

I practice law and maintain my office in rural Lake County, 100 miles north of San Francisco. It is clear that most persons (especially in Lake County, which is a very poor county) would not retain an attorney to represent them in social security matters if it were not for the availability of a contingent fee arrangement. The system should encourage attorneys to represent indigent claimants and handle their claims before the Social Security Administration. At the present time, and during the past few years, there have been approximately 30 to 35 private attorneys in Lake County; however, to the best of my knowledge, I am the only attorney in Lake County who will take a social security disability case. It appears that the lack of attorney interest in these cases stems from the highly uncertain and delayed nature of compensation. If the money were a little better (and quicker) there would no doubt be more attorneys practicing in this specialized field. By comparison, there is no shortage of attorneys who are willing to accept corporate work, insurance defense work or other such work at a guaranteed hourly rate paid in a timely manner.

Not only are social security lawyers difficult to find in rural Lake County where I practice law, but a review of the San Francisco phone book shows that it is not even easy to find a qualified social security attorney in San Francisco, which is more than 100 miles from Lake County. In the Pacific Bell Yellow Pages for San Francisco (September 1986), beginning on page 154 of the first volume of the Yellow Pages is a listing of attorneys categorized by fields of law. **There are only 9 attorneys listed under Social Security Law (page 168).** By contrast, there are 335 listings under Personal Injury & Property Damage (page 164). There are 150 divorce lawyers listed (page 159), 149 real estate lawyers (page 167), and 84 lawyers practicing Insurance Law (page 161). There are even 58 attorneys listed under the specialty Worker's Compensation Law (page 169). There are 29 lawyers listed under the specialty of Anti-trust & Unfair Competition (page 154), and there are even 23 attorneys listed under the esoteric heading of Admiralty Law (page 154). **Again, these figures are in comparison to only 9 attorneys listed under Social Security Law.** Certainly, it appears clear that there is a limited availability of qualified private attorneys for social security disability cases, not just in rural Lake County but also in urban San Francisco, and throughout Northern California.

The shortage of qualified attorneys available to handle social security disability cases will certainly get worse with the new social security policies. Competent attorneys will simply give up their social security disability practices in favor of more lucrative fields. Most attorneys bill at an hourly rate of $125 to $200 per hour, and it is simply not good business to take cases that will only pay you $75 per hour if you win and nothing if you lose.

The Social Security Administration now seems to be ignoring the rationale behind the contingent fee system. Historically, the contingent fee system, which has been recognized by the Social Security Administration in the past, is an important arrangement whereby persons unable to pay for legal services on a cash fee basis are able to secure the services of competent attorneys for necessary representation in social security and other types of legal proceedings. In order to preserve this system for the benefit of all social security claimants, the Social Security Administration should be willing to approve substantial contingent fees in appropriate cases.

Competent counsel can be attracted to the social security disability field, and encouraged to remain in this field, only if the fees received overall (winners and losers) for all work in this field are at least equivalent to the average fees received in other legal fields in which billing is customarily done on an hourly, non-contingent, pay-as-you-go basis. I win more cases than I lose, but I certainly don't come close to winning all my cases. When no benefits are awarded, I receive no attorney fee no matter how many hours I have worked on a case. In order that attorneys in social security disability cases receive reasonable fees for their social security disability work as a whole, and be encouraged to take these cases, it is necessary that fees in some cases be higher than the fees which would be paid if counsel were working on a guaranteed hourly pay-as-you-go rate.

These arguments and principles were recognized by the court in McKittrick v. Gardner, 378 F.2d 872, 875 (4th Cir. 1967), wherein it was stated:

> **Availability of lawyers [to social security disability] claimants is of the highest importance, and if a lawyer is to receive no compensation unless there is an award, his compensation is contingent whether or not he has a contract that says so. Most of the disability claimants have no resources for the payment of fees. The contingency of compensation, whether it stems from an employment contract or results from the claimant's indigency, is highly relevant in the appraisal of the reasonableness of any fee claim. The effective lawyer will not win all of his cases, and any determination of the reasonableness of his fees in those cases in which his client prevails must take account of the lawyer's risk of receiving nothing for his services.**

The contingent fee system is of great benefit to social security disability claimants. If $72.00 per hour fees are awarded for the winners, and nothing for the losers, and if an attorney loses only 25% of his cases, the true hourly fee (considering the cases lost) would actually be $54.00 per hour. Lawyers have various overheads, but I am a sole practitioner and my overhead is about $40.00 per chargeable hour. Obviously, with contingent fees of only $72 per hour, especially taking into consideration the cases lost, there is simply no way that I could afford to continue to represent social security claimants. It seems that this is what the Social Security Administration is attempting to achieve with its new policy on attorney fees.

I respectfully request that The Committee on Ways and Means carefully consider this matter and take some action to remedy this situation. I am a member NOSSCR (National Organization of Social Security Claimants' Representatives) and support that group's efforts on behalf of private attorneys. The issue here is not whether a few lawyers might be making too much money on their cases, but rather the true issue is the right of social security claimants to obtain competent legal representation. The contingent fee arrangement is now being ignored by the Social Security Administration when in fact this is an extremely advantageous arrangement for nearly all social security claimants. It is a sad fact that nearly all people seeking social security disability benefits are having financial difficulties and cannot afford to pay an attorney on an hourly basis. In fact, most social security disability claimants can barely survive while their cases are pending. Thank you very much for your consideration of this most important matter.

Respectfully yours,

Ron Green

RG:ll
cc: Congressman Douglas H. Bosco
    Congressman Barney Frank
    NOSSCR

APR 1 1987

MJW
MICHAEL J. WALL
Attorney at Law

March 31, 1987

Congressman Douglas A Bosco
777 Sonoma Avenue, Suite 329
Santa Rosa, CA 95404

Dear Congressman Bosco:

As you are aware, I represent Social Security Title II and Title XVI claimants in the first congressional district from my office here in Santa Rosa. I must bring to your attention a matter of urgency regarding the availability of legal representation to claimants who are almost always indegent. Lawyers such as myself customarily represent these claimants on a contingent fee basis and the usual arrangement is the lawyer assess by which his fees on 25% of the past due benefits. Obviously this is the only means the great majority of these claimants can get legal representation.

Our fees are approved by the OHA part of SSA. We are used to long delays in having the fee petitions worked on and approved and additional delays in receipt of the payment of the fee, almost always much later than the claimant has received his or her benefits.

This process is now further complicated by a report from the HHS office of the Inspector General which is critical of SSA's handling of attorney's fees. The reports claims that the SSA has done an inadequate of monotoring "excessive" attorney's fees. This is patently ridiculous. They have been doing, an inadequate job of processing the normal and resonable fee request and expediting payment of the fees when due.

We need attorney's fee reform in this area. Please do something with the Congressional Committee which is working on these problems to prevent the implementation of the recommendations contained in the Inspector General's report.

Without representation most of these claimants are helpless before these agencies. The agency is obviously attempting to force private attorney's out of this market because, I suspect, we make things too damn inconvenient for them.

Very truly yours,

Michael J. Wall

MICHAEL J. WALL
Attorney at law

MJW:oam

Barry Wood

ATTORNEY AT LAW
AND
COUNSELOR

518 SOUTH SCHOOL STREET
POST OFFICE BOX 386
UKIAH, CALIFORNIA 95482
(707) 463-1657
WHEEL CHAIR ACCESS

MAY 11 1987

May 9, 1987

Congressman Douglas Bosco
Federal Bldg.
777 Sonoma Avenue
Santa Rosa, CA 95401

RE: Social Security Hearings

Dear Congressman Bosco:

I wish to thank you again for your assistance in various social security matters.

As I explained to you in my previous letter, practitioners of social disability law are finding more and more handicaps in their representation of disability claimants.

I have noticed in the last year that quite often months have gone by after a fee has been approved for my representation of a disability claimant and the Administration simply will not forward the funds. Often I have involved myself in cases where I have done a hearing locally before an Administrative Law Judge, I have received an unfavorable decision, filed an administrative appeal with SSA, gone on to Federal District Court (which is located 115 miles from my office) secured a remand, have ultimately won the case on further hearing, and invested a couple of years time and couple of full weeks legal work in the case, only to find myself further stymied by a refusal of the Administration to release withheld fee funds.

The most current problem facing practitioners like myself is the fee schedule itself. The applicable statutes and regulations provide for a contingency fee basis and a withholding in SSA cases of up to 25% of back benefits payable when an attorney has successfully represented a client. This provision of the law is being ignored by the Secretary in that SSA has recently declared a policy of a flat fee per hour of representation.

I am the most experienced social security disability practitioner in Lake and Mendocino Counties. I have been doing this work for eighteen years. Because of the complexity of the work, other attorneys routinely refer social security matters to my office. As a sole practitioner I am being driven out of business, in general, by astronomical increases in errors and omissions liability, increased costs for rent, supplies, and non-professional help. I estimate that my overhead has tripled in the last ten years and my fees on an hourly basis have almost doubled. It is very difficult to hold the line in representing both members of the middle class public as well as disability claimants.

I got into the disability work in 1968 because nobody else in the area was handling it. In order to give people representation, I had to learn all of the intricacies of social security disability law practice. I take on many complex cases on a contingency basis as social security claimants, as a rule, simply have no source of income to pay an attorney for the time and work involved. I probably spend fifteen to twenty-five hours on each case handled before an Administrative Law Judge, and if we go into the appeal work that time can easily double or triple.

Since the Administrative Law Judges have been reduced to approving fees at a maximum level of $1,500.00, I don't honestly know who is doing the work.

I am enclosing a copy of a letter supplied by an Administrative Law Judge in my district recommending that my fee request for $3,200.00 in a very difficult case involving cardiac and orthopedic problems be approved. The Administration flatly reduced the fee request to $2,100.00 based upon a $75.00 per hour award, totally failing to even consider the matter as having been one taken on a contingency basis. While I believe I am more successful than most practitioners who attempt cases in this field, I don't have a completely successful win rate. Every month I will put, on an average, about twenty to twenty-five hours work into social security disability cases for which I ultimately receive no compensation, but at least give the claimant his "day in court" in presenting his case in the most favorable and fair light. Every year I find myself with about a $1,000.00 to $1,500.00, on the average, in fee awards in SSI cases where my client has simply refused to pay me, since there is no withholding of fees, and I am powerless to do anything about it because the monies are exempt from levy even if I were to reduce my award to a judgment.

Nevertheless, I keep plugging along with representation of social security claimants.

Additionally, the practice is more difficult because of budget cuts within the Administration. I am enclosing a copy of a letter I received from an Administrative Law Judge in regard to viewing files before the hearing. The only way I can adequately prepare for a case is to drive 100 miles each way to the OHA office to review the evidence available in the case and photo-copy those exhibits which are important to my presentation. As you can imagine, just securing the evidence requuires the better part of a day out of my office and a long drive.

Page -3-
May 9, 1987
Congressman Douglas Bosco
RE: Social Security Hearings

In regard to the matter I mentioned previously, the $2,100.00 fee matter, I did go through the appeals procedure. I did not even get a response. I simply got a check for the $2,100.00 and that was it.

I want to continue in this representation. Claimants have nothing to offer me in the way of remuneration except the "carrot on a stick" of back benefits which I must secure for them. Under the new fee procedures, there is less motivation for any attorney to enter this field.

I honestly believe that delays in payment, reduction of fees, difficulties in securing evidentiary files, the monies being spent by SSA in bringing in expert witnesses at government expense to challenge claims and similar procedures can only be viewed as a concerted effort to reduce attorney representation in these cases. I believe the statistics show that a claimant's chance of success and success rate is doubled when an attorney enters this area of law and represents the claimant. Obviously, these policies adopted by SSA are not geared at getting at the truth of a claim and securing a just result. They are designed to thwart otherwise bona fide claims from coming to successful fruition.

Again, thank you for your cooperation in all those past matters in which you have been of assistance to this office.

Respectfully submitted,

BARRY WOOD

BW/cm
Encs.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to:

Region IX
Office of Hearings
and Appeals
Room 206
1099 L Street
San Rafael CA 94901

January 15, 1987

Stanley S. Sadur, RCALJ
SSA, Office of Hearings and Appeals
100 Van Ness Avenue, 24th Floor
San Francisco, CA 94102

Subject: Recommendation of Fee Petition Over $3,000
Robert , SSN:

I recommend that the request for attorney fees in the amount of $3,409.00 be approved for Barry Wood, Attorney at Law, for his services rendered in the case of Robert SSN . The fee is not out of line with the results secured by the attorney. Historically, the contengent fee system, which is recognized by SSA, is an important arrangement whereby persons unable to pay for legal services on a cash fee basis are able to secure the services of attorneys for necessary representation in Social Security and other types of legal proceedings.

In order to preserve this system for the benefit of all Social Security claimant's, the OHA must be willing to approve contingent fees even when the amount is several thousand dollars.

Very Truly Yours

JOHN H. LAWLESS, JR
Administrative Law Judge

JHL:sb

cc: Barry Wood, Esq
P.O. BOX 386
Ukiah, CA 95482

Enclosures:
Fee Petition
Form 1129

DEPARTMENT OF HEALT HUMAN SERVICES

Social Security Administration

Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

To (Name and Address of Representative)

Barry Wood, Esq.
Box 386
Ukiah, CA 95482

Robert
(Claimant)

(Wage Earner) (Leave blank if same as above.)

(Social Security Number)

POD/DIB
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 2100.00 for your services rendered before the Social Security Administration.

NOTE: ***IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED***, an administrative review may be requested by sending a letter within *30 days* to:

Chief Administrative Law Judge, OHA
Attn: Attorney Fee Branch
P.O. Box 3200
Arlington, VA 22203

(See reverse side for additional details.)

The paragraph(s) checked below refer to payment of your authorized fee:

☒ A check will be sent to you from the past-due benefits. If you have any questions concerning the status of the check, write to Office of Disability Operations; Attn: Attorney Fee Branch
P.O. Box 17096
Baltimore, MD 21241

☐ Since the amount withheld is less than the authorized fee, you will have to look to the claimant for any balance due.

☐ You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney; or (3) the claim is for supplemental security income.

☐

cc: OHA, Attorney Fee Branch

ODO, Attorney Fee Branch

ALJ Lawless
OHA, San Rafael, CA

Amt. Req: $3409.00

AUTHORIZING OFFICIAL:

Stanley S. Sadur

Stanley S. Sadur
(Signature)

Regional Chief
(Typed Name)

Administrative Law Judge
(Title)

March 12, 1987
(Date)

cc: (Name and Address of Claimant)

REPRESENTATIVE SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (6/85)
Prior editions may be used

DEPARTMENT OF HEALTH & HUMAN SERVICES

Social Security Administration

Refer to

Region IX
Office of Hearings
and Appeals
Room 206
1099 D Street
San Rafael CA 94901

Attorney Barry Wood
518 So. School Street
P.O. Box 386
Ukiah, CA 954821

Dear Sir:

With respect to your request for copies of the exhibits in the above file, or that the file be forwarded to the District or Branch Office in your area prior to the hearing in order for you to review the same, I cannot guarantee that this can be done. Because of staffing limitations and the increased volume of cases, we can no longer make photocopies of exhibits to send to claimants or their representatives prior to out of town hearings. And because of time limitations it may not be possible to forward the file to the District or Branch Social Security Office in your area prior to the hearing for your review.

I therefore suggest that you arrange to come to the hearing room at the Discovery Inn Motel earlier on the day of the hearing, if the hearing is on Monday, or the day prior to the hearing, to review the exhibits.

Of course, if you are able to come to my office in San Rafael, prior to the week when the hearing is scheduled for Ukiah, you will be permitted to review the exhibits and make photocopies of those exhibits you desire.

Very truly yours

JOHN H. LAWLESS, JR
Administrative Law Judge

JHL:sb

[The following letter and attachment was also submitted by Congressman Bosco.]

DOUGLAS H. BOSCO
1ST DISTRICT, CALIFORNIA

COMMITTEES:
PUBLIC WORKS
AND TRANSPORTATION

MERCHANT MARINE
AND FISHERIES

Congress of the United States
House of Representatives
Washington, DC 20515

408 CANNON BUILDING
WASHINGTON, DC 20515
(202-225-3311)

SUITE 329
FEDERAL BUILDING
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SANTA ROSA, CA 95404
(707-525-4235)

THE EUREKA INN
SUITE 210
7TH AND F STREETS
EUREKA, CA 95501
(707-445-2058)

27 May 1987

MAY 2 [illegible]
WAYS AND MEANS

Joseph K. Dowley, Chief Counsel
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth HOB
Washington, D.C. 20515

Dear Mr. Dowley:

I am enclosing additional testimony from an attorney in my district, Mr. Michael D. Golden, for inclusion in the record of the hearing on attorneys' fees in social security disability cases that was held on May 13, 1987.

Since Mr. Golden's testimony arrived at my district office in California on May 26, 1987, there is not time to submit the requested "original and six (6) copies" via the U.S. mails. It is my hope that the committee will accept and consider this testimony even though the formatting requirements have not been followed.

Thank you for your attention to this material.

Cordially,

DOUGLAS H. BOSCO
Member of Congress

DHB:pb
Enclosures

MAY 26 1987

MICHAEL D. GOLDEN
ATTORNEY AT LAW

Jacoby's Storehouse, Top Floor
791 8th Street P.O. Box 1000
Arcata, CA 95521

Telephone
(707) 822-0315

May 19, 1987

HONORABLE DOUGLAS BOSCO
777 Sonoma Avenue, #329
Santa Rosa, California 95404
Attn: Phyllis Betz

In re: Social Security Disability and SSI Claims

Dear Congressman Bosco:

I write to comment on the continuing problem of attorney's fees in Social Security Disability and SSI cases. I understand that the Social Security subcommittee of the House Ways and Means Committee will be addressing this issue in the very near future and I would ask that my comments be included in the record and given such consideration as the members find appropriate.

In a letter to you dated April 7th, 1986, a copy of which is enclosed, I commented on some of the problems faced by claimants seeking representation, and attorneys seeking to provide that representation. Please note, I also included some specific suggestions for congressional action. I will spare you repetition of those thoughts here, but do wish to add a couple of additional comments. Also enclosed is an editorial from the Los Angeles Herald Examiner, dated April 14th, 1987. On my understanding, the Herald Examiner has a generally conservative editorial policy and I think this editorial is a fair statement of the problem.

Reasonable compensation for claimant's attorneys means being paid at an hourly rate that may seem unreasonably high for those unfamiliar with law office economics. I understand that the Social Security Administration recently considered and rejected a fee ceiling of $75.00 an hour. Presumably, the SSA recognized the gross inadequcy of such a ceiling. The reality is that for most attorneys, given the overhead costs of maintaining an adequate and professional law office, $75.00 an hour is a barely adequate rate for cases where one is being paid by the hour and where compensation is assured. In contingent cases, where payment is dependent upon a successful outcome, such as the disability cases we are considering, there is no way that a competent practitioner can survive at a level of $75.00 an hour in the successful cases. Payment in the successful cases must, as a practical matter, absorb the time spent in pursuit of unsuccessful cases, and the time spent discussing possible claims with claimants which do not result in actual representation. Were a $75.00 an hour ceiling to be enacted, almost all of us would be out of business.

I recognize that attorneys are not a popular group in the eyes of the public at this time and that many might not care if some attorneys were put out of business. Leaving that issue aside, the reality is that if claimant's attorneys are out of business, so, in many cases, are the claimants. This would be a gross miscarriage of justice for persons who are supposed to be able to receive the benefits of the Social Security Act. In addition, the greater the number of unsuccessful claims, the greater the burden on the already overburdened public treasuries of rural counties in our state. Many of the unsuccessful federal disability applicants will wind up, one way or another, on the welfare and general assistance rolls. This is not just an attorney's problem or a claimant's problem, it is a rural taxpayer's problem.

Although the $75.00 an hour ceiling has been rejected by the Social Security Administration, I understand that SSA has recently, by administrative fiat, enacted a procedure whereby any fees in excess of $1,500.00 will be reviewed by the chief regional administrative law judge. While not as draconian a measure as the $75.00 an hour limit, adding an additional level of review will further delay payment of attorney's fees and will, to some extent, exert a chilling effect on representation. I now plan on a delay period of approximately two years between the time when I do the work and the time when I receive payment in these cases. A substantial part of this time is spent waiting for approval of my fee petition and payment. If the wait gets much longer, I will have to become even more selective in accepting these cases. I do not want to have to do that. I do not think that Congress, in enacting the Social Security Act, thought I would have to do it.

As I believe you are aware, the inefficient and inequitable functioning of the Social Security Disbility and SSI appeal and payment process is becoming a crisis of major proportions in this country. The problem of securing adequate representation for claimants is part of that crisis.

I have noticed your thoughtful and often courageous attention to problems, some little understood, that impacted on northcoast residents. I urge that you direct your attention to this one.

Could I be advised as to the present status of this matter

Re: Social Security Disability and SSI Claims
May 19, 1987
Page Three

and your position on it?

Thank you in advance for such attention that you may be able to give to the thoughts expressed in this letter.

Sincerely yours,

MICHAEL D. GOLDEN
Attorney at Law

MDG/pcg
enclosures
cc: Redwood Legal Assistance,
Attn: Victoria Yanez
Ira Blatt, Esq.
Fred Neighbor, Esq.
Steven Gompertz, Esq.
Dominic Banducci, Esq.
Les Scher, Esq.

A14 Los Angeles Herald Examiner, Tuesday, April 14, 1987

LOS ANGELES
HERALD
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Economizing on justice

Since 1981, the Social Security disability system has been in trouble. At that time the Reagan administration took a Carter-era congressional overhaul plan and accelerated its timetable. The result has spelled disaster for hundreds of thousands of disabled recipients.

Under an overly demanding series of medical reviews and tightened eligibility rules, virtually all applicants can now be deemed employable at something — and lose benefits.

Once dropped from the rolls, many recipients simply drop out of sight. But those resourceful enough to appeal have achieved a phenomenal reversal rate. That and a series of adverse court decisions led the administration to suspend the process for the 1984 campaign season.

Since then, it's quietly resumed purging the rolls. And the government has discovered a new way to go after the clients and lawyers who caused them so much grief the last time around: The Social Security Administration cut its fee limit in half, and imposed a new hourly rate.

The rationale being used for the stricter cap on attorneys' fees is a recent audit by the Department of Health and Human Services' Inspector General. The study found that a $3,000 limit on attorneys' fees — modest in most cases — is excessive in a few. When the lawyers lose, of course, they collect nothing. But where severely disabled clients are owed hefty back benefits, a smart counsel can collect the maximum fee with minimal work for a very healthy hourly return.

As the Inspector General's report concedes, extreme cases are rare — less than 1 percent of those surveyed. What's more, there already is a mechanism for protecting the system against attorney exploitation. Attorney fee petitions are now submitted for approval to the administrative law judge hearing the case.

Will lowering the cap raise the return to disability recipients? Not if it discourages lawyers from taking the cases, which is most likely.

In slashing their benefits, the administration forced the disabled to depend on lawyers. Now it's chasing the lawyers away in the name of protecting their disabled clients. It's ironic, and simply unfair.

COMMITTEE ON
RECEIVED
MAY 26 1987
WAYS AND MEANS

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Bldg.
Washington, D. C. 20515

RE: LEGAL FEES IN SOCIAL SECURITY CASES

Dear Mr. Dowley:

I don't trust Social Security's sudden concern about legal fees. I think Social Security is interested in reducing the number of lawyers who are willing to handle these claims. The 25% fee is entirely reasonable and Social Security should not be permitted to interfere with it. I'll bet no one complains about the fees except Social Security. People who have lawyers are entirely satisfied with the services rendered and the fees charged. A 25% fee is a lot lower than someone would have to pay in other types of contingency fee arrangements. Please do anything possible to get Social Security to retract its recent policy which cuts fees and makes it harder for disabled people like me to get lawyers.

Very truly yours,

W R Edwards

William R. Edwards
15 Waters Avenue
Greenville, SC 29605
250 36 7289

GANLY & ASSOCIATES
ATTORNEYS AT LAW
ONE OAK PLAZA, SUITE 109
ASHEVILLE, NORTH CAROLINA 28801

DAVID M. GANLY
THOMAS F. RAMER

TELEPHONE (704) 252-4491

D: May 21, 1987
T: May 22, 1987

COMMITTEE ON
RECEIVED
MAY 26 1987
WAYS AND MEANS

Joseph K. Dowley, Esquire
Chief Counsel
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Bldg.
Washington, D.C. 20515

Re: Hearings of House Subcommittee on Social Security - May 13th

Dear Mr. Dowley:

Enclosed are the requisite number of copies of approximately 40 constituent letters, plus a copy of my own letter to our Congressmen. Whether or not you admit these as exhibits, I leave to your discretion, but I did want these letters to be available to the Subcommittee Members.

Very truly yours,

David M. Ganley

David M. Ganly

DMG/ar

[ADDITIONAL HAND-WRITTEN LETTERS ARE BEING RETAINED IN COMMITTEE FILES.]

GANLY & ASSOCIATES
ATTORNEYS AT LAW
ONE OAK PLAZA, SUITE 109
ASHEVILLE, NORTH CAROLINA 28801

DAVID M. GANLY
THOMAS F. RAMER

TELEPHONE (704) 252-4491

D: May 4, 1987
T: May 22, 1987

The Honorable Jesse A. Helms, Jr.
403 Dirksen Office Building
Washington, D.C. 20510

re: Hearings of House Subcommittee on Social Security - May 13th

Dear Senator Helms:

Each year I represent over one hundred claimants for Social Security disability benefits and I freely acknowledge that about one half of my fees come from Social Security disability claimants. I am not writing, however, on a pocketbook issue. I understand that attorneys' fees are not a hot item on the social agenda.

But the right to retain counsel for those Social Security claimants should be a very hot item.

I and many others believe the Social Security Administration has been taking a number of steps designed to drive claimants' attorneys out of the practice (as I understand they have effectively been driven out of the practice in Black Lung cases).

The obvious reason for this course of action is found in two or three statistics: Unrepresented claimants are successful in only 36% of the cases at the Hearing level. Those represented by attorneys are successful, nationally, 60% of the time. Those attorneys who might be classified in this narrow specialty as "heavy hitters" probably average an 85-90%, or greater, success rate. This means a claimant who can obtain competent attorney representation will have two times or more better chance of being found eligible for benefits than one who appears for himself.

The Social Security Administration does develop a claimant's case to some degree in order to make determinations, but it does not have the same manpower or motivation that the private bar has. The corps of Administrative Law Judges has consistently recognized that the private bar significantly adds to the development of Social Security disability cases. As the statistics vividly show, the impact of effective representation is tremendous.

[congfees.057]d1.20

In recognition of that significant impact, the Social Security Administration seeks to deprive Social Security disability claimants of their right to effective counsel. If the Social Security Administration has its way, claimants will be unable to find attorneys to handle their cases.

The claimants, even those who have been deprived of much education, readily recognize the issue. I am enclosing a packet of letters from our constituents on this issue written after SSA's attempt last fall to lawfully accomplish what they are now trying to accomplish unlawfully. I did ask these folks to write, but the views and the words are their own.

This issue is fast reaching a crisis point. Attorneys are finding their fees being arbitrarily cut with frequency and, under the new, and we believe, illegal, rules, will find fees cut at a lower level and will find payments further delayed. Numerous effective Social Security attorneys are contemplating leaving the practice.

The details of the threat are, I am sure, known to you and your aides. Those details and a proposed solution are set out in the accompanying brief memorandum published by the National Organization of Social Security Claimants Representatives [NOSSCR].

The future of tens of thousands of claimants every year will rest upon the availability of counsel. On their behalf, I urge you to see to it that legislation is passed this session to remove the Social Security Administration from the fee approval process except in cases where warranted.

Thank you for your kind attention.

Very truly yours,

David M. Ganly

[congfees.057]dl.20

October 11, 1986

Ms. Dorcas Hardy
Commissioner, SSA
P.O. Box 1585
Baltimore, Md., 21208

This is to comment on your proposed rules for"Own-Motion Review" of attorneys fees as published in the Federal Register, Vol. 51 No. 155, page 28834, August 12, 1986. I am opposed to these rules because of the following reasons:

My husband, became disabled in 1982 due to a heart attack and subsequent open heart surgery. His doctor contacted the Social Security Administration in Raleigh, N.C. and told them he would never be able to work again, yet it became necessary for him to engage an attorney before it was finally approved. We had no income for well over a year.

I earnestly beleive the Social Security Administration is trying to force attorneys to abandon claimants who have been given a "hard time" by the Social Security Administration.

I have a claim in now which has been denied and I have been paying Social Security for over 20 years out of my pay check. I had to quit my job on doctors orders, I had no other alternative but to engage an attorney to try to get what is rightfully mine. Without an attorney I would not have a leg to stand on. It would be the end of the line after paying into Social Security all these years. I know of numerous cases similiar to mine.

We need attorneys to protect us from the Social Security Administration, because Social Security is certainly not in our corner.

I sincerely urge Congress to settle this issue once and for all. We are hopeless without them.

Sincerely,

Clara Hess

Clara Hess
58 Haw Creek Circle
Asheville, N.C. 28805

WILL T. DUNN, JR.
ATTORNEY AT LAW, P.A.
400 PETTIGRU STREET
GREENVILLE, SOUTH CAROLINA 29601

(803) 242-1303

OCT 01 REC'D

September 30, 1986

David Ganley, Esq.
1 Oak Plaza, Suite 109
Asheville, NC 28801

Dear Dave:

I enclose my most recent correspondence to Mr. Kimmelman of the Consumer Federation of America, and the revised resolution of SCTLA opposing the proposed regulations relative to attorneys fees.

Please call me at your convenience and tell me what progress you are making with Senator Helms.

Yours truly,

Will T. Dunn, Jr.
Will T. Dunn, Jr.

WTDjr/na
Enclosures

WILL T. DUNN, JR.
ATTORNEY AT LAW, P.A.
400 PETTIGRU STREET
GREENVILLE, SOUTH CAROLINA 29601

(803) 242-1303

September 30, 1986

Mr. Gene Kimmelman
Consumer Federation of America
1424 16th Street, N. W., Suite 604
Washington, D. C. 20036

Re: Proposed Changes in Social Security Disability, Black Lung and SSI Regulations

Dear Gene:

About a week ago, I sent you a copy of a letter from Barney Smith, President-Elect of the South Carolina Trial Lawyers Association. That letter contained a proposed resolution from SCTLA, opposing efforts of the Secretary of Health and Human Services to change the regulations governing approval of attorneys fees in Social Security, black lung and SSI claims.

We have revised the form of the resolution, and I enclose a copy of the revised resolution. The provisions basically emphasize the impact of these proposed regulatory changes on the public, whereas we thought the original form of the resolution overemphasized the impact upon attorneys.

These proposed regulatory changes will have a devastating effect upon the public, apart from any detriment to attorneys. For this reason, we feel that the SCTLA, the National Organization of Social Security Claimants' Representatives, the Association of Retired Persons, and your organization have a common interest in resisting attempts by the Secretary of Health and Human Services to alter existing regulations.

As I previously advised you, we would also like to implement legislation in Congress that would create a more equitable system for setting attorneys fees in these cases. Basically, our proposal would incorporate the following:

1. That 25 per cent of backdue benefits, which is presently the amount Congress has authorized to be withheld toward payment of attorneys fees, be presumed to be a reasonable fee in every case;

2. That the claimant, the agency and the attorney would have a right to object to any fee, and

3. That all parties concerned, claimant, agency and attorney, would have a right to appeal fee disputes through the federal judicial system, which is currently not the case.

As an additional reminder, be advised we have until October 14, 1986 in which to submit objections and comments to the regulatory changes. For your convenience, I enclose another copy of those changes as published in the Federal Register.

Thank you again for your willingness to help us in this endeavor.

Yours truly,

Will T. Dunn, Jr.

WTDjr/na
Enclosures

✓ cc: David Ganley, Esq.

RESOLUTION

BE IT RESOLVED that the South Carolina Trial Lawyers Association joins with the National Organization of Social Security Claimants' Representatives, the Association of Retired Persons and other groups in opposing proposals by the Secretary of Health and Human Services to alter the manner in which attorneys fees are approved in Social Security disability, black lung and SSI claims. These proposed regulatory changes were published in the Federal Register, August 12, 1986, at p. 28834.

SCTLA opposes the proposed regulations for the following reasons:

1. The proposed regulations would further erode the authority of the Administrative Law Judges who hear disability cases, and who are in the best position to determine reasonable fees for attorneys who appear before them;

2. The proposed regulations will pit lawyers against their claimant-clients and encourage disputes over fees where none would have existed under the present system;

3. By encouraging fee disputes between lawyers and clients, the proposed regulations will cause devastating stress upon claimants with nervous disorders, who probably comprise one-half or better of all Social Security disability and SSI claimants;

4. The proposed regulations will ultimately discourage competent lawyers from taking Social Security, black lung and SSI cases, leaving millions of disabled Americans at the mercy of the bureacracy.

Lastly, SCTLA feels the proposed regulations are nothing more than a blatant attempt by the Secretary of Health and Human Services to remove lawyers from the system, and thereby obtain absolute, unbridled control over which disabled claimants are paid and which are not.

SCTLA enlists the assistance of members of Congress in resisting the proposed regulations.

IT IS SO RESOLVED.

Date: ______________________ ______________________

P.O. Box 67
Spruce Pine, N.C. 28777
October 24, 1986

Ms. Dorcas Hardy
Commissioner, SSA
PO Box 1585
Baltimore, Maryland 21203

Dear Ms. Hardy:

This is to comment on your proposed rules for Own-Motion Review of Attorneys' Fees as published in the Federal Register, Vol. 51, No. 155, page 28834, August 12, 1986. I am opposed to these new rules because it will leave Social Security Disability claimants without any protection from the Social Security Administration.

I am one of those persons who has been ordered by doctors to quit my job. I am not supposed to do housekeeping chores. In spite of this my application has been denied, and my only recourse is to obtain an attorney.

It should be obvious that if this rule goes into effect challenges to claims that have been denied by the Social Security Administration will drop drastically. This will leave claimants at the mercy of the Social Security Administration.

While I need protection under the Social Security system, I do not need protection from my attorney.

I believe that Congress should settle this issue once and for all. This is a rule to safeguard the Social Security Administration, not individual claimants.

Sincerely,

Dorothy S. Borders

Dorothy S. Borders

P.O. Box 271
Arden, North Carolina 28704
October 28, 1986

Ms. Dorcas Hardy
Commissioner, SSA
P.O. Box 1585
Baltimore, MD 21203

Reference: Own-Motion Review

Dear Ms. Hardy:

This is to comment on your propsed rules for Own-Motion Review of Attorneys' Fees as published in the Federal Register, Vol. 51, No. 155, page 28834, August 12, 1986. I am opposed to these new rules because I don't believe I would have been approved for Social Security disability if it hadn't been for my attorney defending me in front of the judge. I have been out of work since July 1984 and had seeked help from every possible source and noone would help me. I had been turned down for SS disability benefits twice before. I believe I would have been denied the third time if my case had not been reviewed before the judge with my attorney. The second time I was denied the doctor's report had never been sent to the SSA. I was being turned down because of a reaction I was having to a medication but the SSA refused to consider that. If I hadn't retained an attorney to present my case to the judge, I would never been able to have gotten the SSA to listen to my case and look at it in the perspective the attorney presented it.

I believe SS is trying to force attorneys to abandon their claimants. Social Security realizes if attorneys do abandon us, we must accept whatever decision they make and there will be nothing we can do. I feel this is very unfair. We do not need to be protected from our attorneys but from the injustice of the SS. It is unfair for the SSA to deny a claim when they don't take the time or have the medical knowledge to review a claim.

When a person has worked since 16 or 17 years of age and all of a sudden must stop working due to medical reasons and spends $1000's of dollars a year on doctors and medicines, I feel the SSA should be more careful in reviewing a case. Most people that are use to working are not just looking for a handout. It is worth the payment to an attorney to have their help in presenting a claimants case to the judge who will listen and review the facts of the case.

I feel it would be an injustice to allow the SSA the right to cut the authorized fees of the attorneys because without attorneys that will take SS claimants' cases, the claimants do not have a chance against the SSA. That is exactly what the SSA wants.

I believe that Congress should settle this issue once and for all. I feel Congress should consider the SS claimants' positions and not let the SSA have their way and bully the Social Security claimants.

Sincerely,

Linda Brackett

Linda Brackett

Roy McNeil
247 Leicester Hwy.
Asheville, NC 28806

November 1, 1986

Ms. Dorcas Hardy
Commissioner, Social Security Administration
PO Box 1585
Baltimore, MD 21203

Dear Commissioner Hardy:

This is to comment on your proposed rules for Own-Motion Review of Attorneys Fees as published in the Federal Register, Vol. 51, No. 155, page 28834, August 12, 1986. I am opposed to these new rules because claimants of Social Security benefits like myself will not be able to find attorneys willing to take Social Security cases if their fees are threatened. Without an attorney, deserving claimants who are repeatedly turned down for benefits will have no recourse as they find themselves at the mercy of Social Security Administration. That is more frightening and threatening to me than paying the fees of an attorney of my choice who specializes in Social Security claims.

After being turned down three times by Social Security Administration, I hired a competent attorney who skillfully handled my paperwork, set up a hearing with a judge, and got statements from my physicians and a vocational specialist who easily could see, as did the judge, that my hands were incapable of performing any kind of work. It was obvious that Social Security Administration had not judged fairly in my case. Since only 5-10% of claimants can get Social Security benefits on their own, an attorney becomes necessary.

These proposed rules seem to be aimed at forcing attorneys to abandon their claimants, and gives Social Security Administration too much power. I intend to ask my congressman for legislation to resolve this issue once and for all.

Sincerely,

Roy McNeil

Roy McNeil

cc: LM

October 16, 1986

Ms. Dorcas Hardy
Commissioner, SSA
PO Box 1585
Baltimore, MD 21203

Ms. Hardy:

This is to comment on you proposed rules for Own-Motion Review of Attorneys' Fees as published in the Federal Register, Vol. 51, No. 155, page 28834, August 12, 1986.

I am opposed to these new rules because I feel this would be of great disadvantage to thousands of disable people that have no where else to turn to. This would let Social Security do just what they want to do, make people give up if they cannot find someone who is willing to fight for them and understand what they have been through with Social Security and really treat them as a person.

I am speaking from experience we had been through the worst kind of treatment for five years., We had nowhere else to turn to untill we found a attorney that really had a heart and knew the laws and was willing to work for us.

We would have never won our case if we had not found a good attorney. We would have been willing to pay him twice what he charged for the help he gave us. This new rule would be the most inhuman act that could be bestowed on disable american people.

I feel the attorneys are the last hope many people have. The fees do not need cut, they really need to be raised.

Americans that are disable need to have someone understand what Social Security is trying to do to them.

I believe Congress should really look into this matter and see how many people it would really destory if this rule goes into effect.

Thank you,

Mr. & Mrs Kenneth Buchanan

Mr. & Mrs. Kenneth Buchanan
671 Cane Cr. Rd.
Bakersville, N.C. 28705

MAR 17 1987

STEVEN R. JACOBS
ATTORNEY AT LAW
TWO MARKET SQUARE
SUITE 960
251 EAST OHIO STREET
INDIANAPOLIS, INDIANA 46204

TELEPHONE
(317) 637-2400

March 16, 1987

The Honorable Andrew Jacobs, Jr.
1533 Longworth House Office Building
Washington, D. C. 20515

Dear Andy:

Congratulations on your election as Chairman of the House Social Security Subcommittee. Congratulations, also, on receiving all the headaches that come with the Chairmanship.

As you know, I am a member of the National Organization of Social Security Claimants' Representatives, and very active in the practice of Social Security Disability. At this time, it has come to my attention that the Administration has opted for another controversial policy which is in my opinion unjustified and a waste of time and money. The Administration is now determined that they are no longer going to allow Administrative Law Judges to approve a fee any greater than $1500.00. Until recently, this had been $3,000.00, but they have new instructions determined that they feel that Administrative Law Judges are not capable of awarding a fee of over $1500.00, or more than $75.00 per hour.

In my practice, when I had a fee generated on a case that was anywhere between $2000 and $4000, I would always opt to leave the fee with the Administrative Law Judge. This meant on numerous occasions my time and the amount of benefits withheld may approach $5000.00, but I would apply only for $3,000.00 knowing the Administrative Law Judge could look at the complexity of the case and the amount of time that I spent, and I felt that the

$3,000.00 was adequate. In fact, in 99.9 % of all cases, I believe a $3,000.00 fee is adequate for any attorney. However, I cannot say that about a $1500.00 fee. I believe that there will be a tremendous increase in fee petitions going to the regional office taking up more time, boggling the entire system, and really would serve no purpose. It would in fact, discourage attorneys from taking too many Social Security cases.

My preference is to allow an automatic 25% fee to be paid directly to the attorney with a provision that either the claimant or the attorney can ask for review by the Administration if they disagree with this automatic payment. However, this new policy appears to me to be another attempt by the Administration to discourage any attorneys from practicing extensively in the social security area. I would appreciate you giving this letter your attention and weighing the matter seriously when you hear of this proposed change.

Thank you.

Sincerely,

Steven R. Jacobs

SRJ/blp

74-911 038

May 12, 1987

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102, Longworth House Office Bldg.
Washington, D. C. 20515

Dear Mr. Dowley:

I am writing to express my concern over a recent policy developed by Social Security that will make it more difficult for lawyers to be paid for legal services. As an individual who applied for Social Security disability benefits, I am quite familiar with how difficult it is to receive those benefits. It would be impossible for a disabled person out of work to hire a lawyer unless the lawyer was willing to work on a contingency arrangement. 25% of the past due benefits is certainly a reasonable arrangement for compensating the attorney. It is unfair for lawyers to perform well and then have Social Security make it extremely difficult for them to be paid. You cannot conceive of the fight that exists with Social Security to qualify for disability payments. Even after my attorney was able to obtain a favorable result, we are still fighting with Social Security to correct numerous payment errors and to obtain correct payment and computation of benefits. Countless computation errors were made by Social Security officials that had to be resolved by my attorney. Overwhelming proof of disability was required at every level of administrative review. I spent over $500 requesting all types of medical and vocational information to rule out every conceivable theory that Social Security could develop to keep me from being paid. After exhaustive administrative review of my claim, I was finally paid in July 1986.

Social Security is trying to sell this sub-committee on the notion that it's easy to get benefits and that lawyers are being over-compensated for services rendered in routine cases. Nothing is further from the truth. More lawyers should be encouraged to handle more disability claims and it should be easier for them to be paid. I have seen what my lawyer has had to go through to be paid and it is a ridiculous unnecessary exercise in paper work. He took considerable risk in representing me. He advanced money and he advanced considerable time and energy on my behalf.

Social Security has been unreasonable throughout my claim and bitterly opposed my claim at every level of administrative review. Fortunately, the United States District Court was available to review the manner in which Social Security had stubbornly opposed my claim. I was also fortunate to have an expert in Social Security matters to be assisting me.

Mr. Joseph K. Dowley
Page 2

I ask the sub-committee to do anything possible to resist the current effort of Social Security to complicate the fee petition process of authorization and payment of reasonable fees. Lawyers who take these Social Security cases (the few who are willing to take them) do so at considerable risk. They should be compensated not only for this skill and service, but they should also be compensated for the risks they take in handling these claims.

I do not believe that the Social Security Administration really has the interest of disabled beneficiaries in mind when they are making proposals to make it harder for lawyers to receive a full 25% fee. I think that Social Security is interested in making it more difficult for lawyers to take these cases. That would mean fewer and fewer people would be able to hire lawyers and the number of disabled claimants would be less. I think that's probably what Social Security is really trying to do.

Thank you for entering this letter in the record.

Very truly yours,

Paul H Lamb

Paul Lamb
Route 1, Box 265
Cowpens, S. C. 29330

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

ROBERT J. MRAZEK
3RD DISTRICT, NEW YORK

COMMITTEE ON
APPROPRIATIONS
WHIP AT LARGE

May 19, 1987

Congressman Andrew Jacobs, Jr.
Chairman
Committee on Ways and Means
Subcommittee on Social Security
B 316 Rayburn Building
Washington, D.C. 20515

RECEIVED
MAY 26 1987
Ways and Means
Subcommittee on Social Security

Dear Mr. Chairman:

Thank you for the opportunity to present my views concerning the matter of the tentative guidelines recently put into effect by the Social Security Administration's (SSA) Office of Hearings and Appeals (OHA) which lowered the limit on allowable attorney's fees awards in successful benefit appeals.

I believe there are two equally important reasons why this recent decision by OHA is a bad one. The first involves the ability of attorneys to be adequately compensated for the work they do on behalf of the claimants they represent. It seems only reasonable to insist upon a fee structure which guarantees a satisfactory wage for those attorneys who specialize in Social Security claims. In my view, the OHA change can only inspire these attorneys to transfer to other areas of the legal profession where the compensation is more commensurate with the work done.

The second reason involves protecting the rights of beneficiaries who have valid claims against SSA. If this change in the fee structure will, as I believe, cause many attorneys who specialize in Social Security cases to switch to other categories of legal employment, this can only impair the ability of many seniors to successfully secure sound legal representation.

To conclude, I urge you to closely examine the effects of this recent change, and work to ensure that both claimants and the attorneys who represent them get a fair deal.

Sincerely,

Bob

Robert J. Mrazek
Member of Congress

RJM:sgp

MAR 17 1987

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JAMES ATLAS
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TELEPHONE
(317) 634 2200

March 13, 1987

Honorable Andrew Jacobs, Jr.
1533 Longworth House Office Building
Washington, D.C. 20515

Dear Congressman Jacobs:

I last corresponded with you on October 15, 1986 concerning the affairs of the Social Security Administration and its Own Motion Review Of Attorney's Fees. The proposed Rule was published in the Federal Register, Volume 51, No. 155 on August 12, 1986. It is my understanding that the Social Security Administration has shelved this proposed rule. However, the Administration is now attacking attorney fees by an internal policy. Presently, the Administrative Law Judge (ALJ) has the authority to authorize fees up to a ceiling of $3,000.00. Fees requested for more than $3,000.00 are set by the Regional Chief Administrative Law Judge. In our area, the Regional Chief Administrative Law Judge sits in Chicago, Illinois.

The Office of Hearings and Appeals has changed this. I understand that under new internal instructions, the ALJs will have the authority to set fees up to a ceiling of $1,500.00. In addition, the ALJs may not set fees at a rate greater than $75.00 per hour. Fee requests for more than $1,500.00 and/or more than $75.00 per hour will go the Regional Chief ALJs.

In October, 1986, I attended a conference of the National Organization Of Social Security Claimant's Representatives. At the conference, it was announced that the membership in the organization was down, and that a number of lawyers who practiced in the area of Social Security disability law were abandoning this area of practice.

On March 8, 1987 I returned from a week long conference sponsored by the Indiana Continuing Legal Education Foundation for a review of general Indiana law. This seminar was attended by approximately 100 lawyers. As far as I could ascertain, I was the only lawyer in attendance with a substantial Social Security practice. In conversation with a Vincennes lawyer, I was characterized as "noble" for handling Social Security cases. I spoke with two lawyers from Vincennes, and lawyers from Evansville, Lebanon and [illegible], Indiana. All of the mentioned lawyers were from firms of 4 lawyers or more. None of their firms handled Social Security cases. The Lebanon lawyer was unaware of any Boone County lawyer handling Social Security cases on a regular basis. I did meet one lawyer who was a young associate with a 5 man firm in Evansville who admitted that he handled a few Social Security cases, but that his firm no longer handled them because he became frustrated with the system and complained to the partners on the lack of return for his time invested.

The point to be made is that there are lawyers practicing in the area of Social Security disability law. However, in some communities, lawyers with familiarity and expertise in the Social Security law are difficult to find. It appears that the Social Security Administration is intent on making it less attractive for lawyers to practice Social Security law by further restricting the attorney fee approval system.

It is important to remember that a Social Security case is usually handled on a contingent fee basis. I cannot handle a contingent fee case on $75.00 per hour for the cases that I win. I have not reached a level of competancy in my practice or the selection of my cases that I can boast that I win 100% of my cases.

Since I have returned from the conference, I have received notice of two fees which are illustrative of my point. On Monday I received a fee authorization from an A.L.J. allowing me to charge and receive a fee of $3,000.00 for representing a client. This is the maximum amount that the Administrative Law Judge can approve. This also represents a remuneration of $128.00 per hour for time invested in the case. This fee certainly is excessive under the proposed instructions for fees. However, two days later I received an award certificate indicating that the maximum amount of attorney's fees being withheld in another case is $818.00. In the event that I am successful in obtaining approval of the full fee, this will represent remuneration in the amount of $38.00 per hour. This particular case required my travel to Terre Haute, Indiana and the advanced payment of costs for medical reports and medical records. In the event that I am unable to recover my costs, my hourly rate will be further reduced. One might suggest that my average rate of return for these two cases still well exceeds $75.00 per hour. However, these cases are taken on a contingent fee basis. I expect that compensation received will reimburse me for winners on the high and average end, however, it will also be offset with winners on the low end and losers where no compensation is received. When things are balanced but in the larger scheme of things, I am not receiving excessive fees for representing Social Security claimants.

I believe that the ALJ who has had the opportunity to observe a lawyer's work in the case before him and his expertise and competence in other prior matters is much more capable of evaluating the reasonableness of the an attorney fee. Therefore, the A.L.J. in the local Office of Hearings and Appeals is the proper person to evaluate attorney fees rather than a faceless Regional Administrative Law Judge in Chicago, Illinois who reviews nothing but a fee petition.

The present system for approval of fees is found at 42 U.S.C. §406(a) and 20 C.F.R. §404.1720 et seq. Maybe it is time to consider statutory intervention. I can live with a complete deregulation of attorney fees. This would include the elimination of the authorization procedure and the elimination of direct payment from withheld past due benefits owing the claimant. I can also live with a minimal regulation system which provides for an automatic payment of 25% of past due benefits to the representative. I have often thought that if the Social Security Administration would follow the tenor of the Reagan administration toward deregulation, the S.S.A. should be more inclined toward retreating from the authorization and approval of attorney fees. Instead, the S.S.A. has adopted a present course of action of over-regulation which may in effect drive more lawyers from representing claimants before the S.S.A.

When a client comes to me, he is advised at the initial interview that I intend to seek approval of a fee equal to 25% of his past due benefits together with out-of-pocket expenses. That is the basis and the cornerstone of my attorney/client relationship. As the S.S.A. regulations become more complex, the need for skilled and competent lawyers for claimants increases. It is well documented that unrepresented claimants lose a higher percentage of cases than those represented by counsel. I can cultivate and develop other areas of law to practice in. However, the ultimate damage will fall upon the Social Security claimant who may have greater difficulty in obtaining professional legal representation.

I feel blessed and honored that I have the opportunity of access to your Office as my representative and the principal representative in Congress of many of my Social Security disability clients. Your help is needed and will be appreciated.

Very truly yours,

Phillip V. Price

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May 25, 1987

Mr. Joseph K. Dowley, Chief Counsel
Committee on Ways and Means
United States House of Representatives
Room 1102, Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Dowley:

I am writing this letter with respect to the Social Security attorney fees hearings recently conducted, with which I understand that you are involved. I have a great deal of interest in this subject, since I do a fair amount of Social Security disability work. Over the past seven years, I estimate that I have worked on some one hundred twenty-five (125) Social Security disability cases. I have an estimated forty (40) such files currently open.

My experience suggests to me that the system which existed prior to the March 31, 1987 revisions promulgated by Associate Social Security Commissioner Eileen Bradley was working fairly well. The only facet of the former system with which I had any problem was the delay in getting an approved attorney's fee paid. That has been a consistent problem in my work in these cases, and that problem has gotten worse in the last year or so. Associate Commissioner Bradley has written to me, indicating that the revisions she implemented were in response to a January 14, 1987 report by the Office of the Inspector General, which suggested that the awards of attorney's fees in some cases had been abusive. I have seen nothing which the OIG considered in making that determination, but I gather from Ms. Bradley's letter to me that the OIG believed that the compensation received by some attorneys in a few cases, calculated on an hourly basis, was excessive. What the OIG has failed to consider, however, is the nature of the cases and the nature of the fee agreements in them. These cases are virtually all contingent fee cases, in which a retrospective application of an hourly rate is unjustified. While I offer my disability clients the option of a contingent fee or a time-and-expense fee, I have never had a disability client who could afford the time-and-expense basis.

The specifics reported by Ms. Bradley in her letter to me suggest an even more disturbing problem with the OIG's report. According to her letter, the OIG found fees as high as $750.00 per hour in some cases, "depriving claimants of the appropriate measure of the economic benefits to which they were entitled."

Aside from the inappropriate consideration of an hourly rate in what is fundamentally contingent fee work, the OIG ignores the fact that the attorney in many of these cases is responsible for getting claimants the "appropriate measure of the economic benefits to which they were entitled." The Social Security Administration's own figures reveal that favorable decisions were received in 60.1% of cases in which there was attorney representation, while only 36.3% of unrepresented claimants received favorable decisions. (Social Security Forum, Vol. 9, No. 3.) Up to the point at which a favorable decision was received, the Social Security Administration had been quite content in these cases to see the claimant receive no measure of economic benefits. If I may return for a minute to the OIG's concern at the hourly rates being generated in some of these cases, I think the OIG has missed the mark. The real question which the OIG apparently ignored is: What did the attorney who received the $750.00 hourly fee do to earn that fee? If the OIG takes the position (as it apparently does) that no effort by an attorney can ever be worth $750.00 per hour, I cannot agree with its position. And, we are not told whether the claimant was satisfied with the attorney's effort. (Client approval of a requested fee should not be controlling, but in my experience, client approval of a fee is weighted too lightly by those individuals in the Social Security Administration charged with evaluating fees.) Further, the $750.00 hourly rate really is an artificial "high" at which the OIG apparently was shooting. The figures which I have seen suggest that 96% of fee petitions resulted in fees under $200.00 per hour. (Social Security Forum, supra.) That is a realistic level of compensation in these cases, in my opinion. The OIG apparently would like to see a $75.00 per hour cap on fees in these cases. I think you will see attorneys leave the Social Security practice in droves if that hourly rate is the cap. It ignores the risks inherent in contingent fee work, and provides no real incentive to an attorney to get involved in these cases. Fees should be set so as to provide an incentive to attorneys to work on these cases, while at the same time provide the claimant with a measure of economic security in seeing that his back benefit award is not gobbled up. I think the former system did exactly that. And, it did so in spite of the fact that most of the fee petition reviewers are not attorneys. I will leave it to your imagination to consider how a non-attorney can have the expertise necessary to determine what work done by an attorney in these cases is proper, necessary, effective, wasted, etc. The one reform which I would like to see in the former system is a requirement that all reviewers of fee petitions be attorneys who have engaged in practice, so that they are familiar with the processing of social security cases, and with the economics of a law practice. If the OIG report had been generated by attorneys who had experience in private practice, I think the report would not have come down in favor of a $75.00 per hour cap on attorney's fees.

I want to provide you with the approach which I have taken in Social Security cases over the past few years. I have found this approach fair both to my clients and to me. My standard contingent fee is a forty percent (40%) fee. My situation is somewhat different from most attorneys who concentrate in these cases, in that I have a substantial amount of travel time to and from hearings, since I am located about equally distant from the four hearing sites utilized in my area. Second, I typically travel to a treating physician's office for a deposition, and that requires additional travel and preparation time. Third, I make it a policy to gather as much medical evidence as possible independently, refusing to rely on the Social Security Administration's medical evidence. Because of my geographic situation, and because of the approach I take to these cases, I determined that the typical twenty-five percent (25%) fee would not make these cases profitable for me. I have encountered virtually no resistance to the fee agreement I use. In the seven years that I have been doing Social Security work, I can recall losing only two prospective clients over the size of the fee. I had not had a chance to meet with either of these people. One prospective client told me by phone that his insurance agent had told him that he could not be charged more than twenty-five percent (25%) and would not pay more; another called to say that he had been told by Indiana's Disability Determination Section that twenty-five percent (25%) was the legal limit on attorney's fees, and that Legal Services had told him they would locate a paralegal to represent him free of charge. (I feel sorry for this latter person.)

I also would note that I have not encountered the rubber-stamp approach to setting attorney's fees that the OIG found to be wide-spread. Most of my fee petitions result in fees which are reduced below the fee I request.

In summary, I favor the reinstitution of the former system undone by Associate Commissioner Bradley. The few changes necessary to make the former system work better can be made with only a minimal impact on the Social Security disability process. The present system is simply unworkable, and is designed to produce fees which are not conducive to attorney involvement in these cases. I do not favor the proposal put forward by the National Organization of Social Security Claimants' Representatives, of a presumed twenty-five percent (25%) fee with a ceiling of $4,000.00, because I believe that proposal is geared to attorneys practicing in large volume, in sites close to the locations of hearings.

Thank you for considering my views on this matter.

Very truly yours,

Steven K. Robison

Steven K. Robison

COMMITTEE ON
RECEIVED
MAY 26 1987
WAYS AND MEANS

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Bldg.
Washington, D. C. 20515

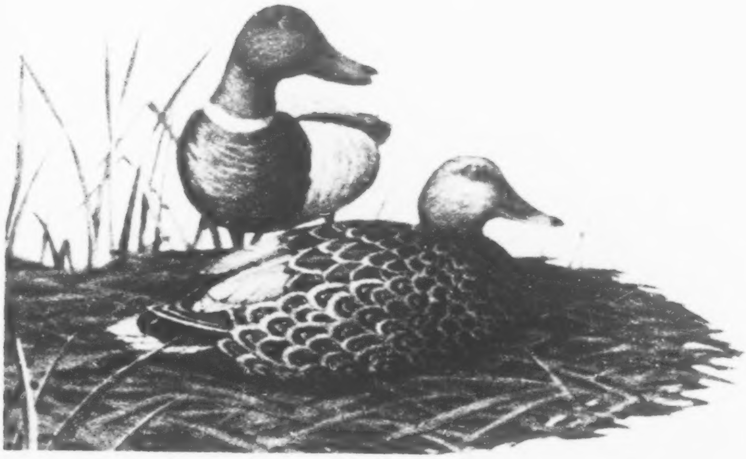
Subject: Legal Fees/Social Security

Dear Mr. Dowley:

Your sub-committee recently received testimony and the record has been held open for additional comments. As a disability claimant, I would like for my views to be considered by your sub-committee.

It is totally unreasonable for Social Security people to interfere with a contract between me, and my attorney. The only way that I could hire an attorney was on a contingency fee basis. I cannot pay a lawyer on an hourly basis. I think a 25% fee arrangement is entirely reasonable and Social Security should not be allowed to cut fees and do things that are going to make it hard for the lawyer to be paid.

I think Social Security is devising a plan to cut the number of lawyers who will be available to disability clients. The easiest way to do that is to interfere with reasonable compensation for attorneys. Thousands of people had Social Security claims last year where they were represented by an attorney. How many times did a client complain about the 25% contingency fee arrangement? Has anybody at Social Security told you



Mr. Joseph K. Dowley
Page 2

that a lot of complaints were being received? I think not. This 25% fee system is so reasonable that I doubt that anyone complained about the fee. This fact alone is conclusive evidence that disabled people who want to hire lawyers are satisfied with the fees being charged.

Please do something immediately to get Social Security out of this area. They don't have any business cutting fees and they don't have any business delaying the attorney's ability to be compensated quickly.

The current fee petition process creates a lot of extra paperwork (wasted hours by the lawyer) and a lot of additional paperwork for Social Security. I think a lot of money could be saved if this whole thing could be simplified and a lot of paperwork could be eliminated.

Very truly yours,

Jack T. Silkwood

Jack T. Silkwood
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COMMITTEE ON
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MAY 26 1987
WAYS AND MEANS

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Building
Washington, D. C. 20515

Dear Sir:

I certainly hope your sub-committee is going to do something to make it harder for Social Security to interfere with the lawyer/client relationship.

Social Security clients must have lawyers in dealing with Social Security. The only way they can hire lawyers is on an arrangement that the fee is paid if the case is won. That is so reasonable that it is hard for me to believe that Social Security is trying to do something to interfere with that arrangement.

I want your Social Security sub-committee to be aware of the fact that disabled citizens, like myself, think this 25 percent fee arrangement is a good idea because it is going to make sure that money is available to pay lawyers good fees for good services. Please don't let Social Security sell you on the idea that lawyers are overcompensated. I don't think that is true. I don't think that anybody is complaining about the 25 percent fee arrangement except the people at Social Security. I imagine that they want to cut the number of lawyers who would be available to handle these claims. I think their own statistics will show that people with lawyers do a lot better with a claim before Social Security than people who don't have lawyers.

Thank you for anything you can do to make sure that lawyers will continue to be available to handle disability claims. The contingency fee contract and the 25 percent fee are important and should not be bothered by Social Security. Please fix it where they can't continue to do things to make it hard for lawyers to handle these cases and be paid.

Sincerely,

E. June Scott

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COMMITTEE ON
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MAY 22 1987
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May 15, 1987

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Building
Washington, D. C. 20515

Subject: Attorneys' Fees in
Social Security Claims

Dear Mr. Dowley:

As President-Elect of the South Carolina Trial Lawyers Association, I wish to have these comments entered into the official sub-committee record in opposition to recent policy changes effectuated by the Social Security Administration. It appears that the Social Security Administration has attempted to do through policy change what it was unable to accomplish through the Federal Register in August 1986. At that time Social Security was attempting to centralize the fee authorization process in Social Security disability litigation. Unanimous and overwhelming opposition to those proposed regulatory changes caused the Administration to abandon that approach to the matter. On March 31, 1987 Social Security developed a policy change which allows the desired result while trying to minimize possible public criticism and comment.

The South Carolina Trial Lawyers Association opposes a March 31, 1987 memo which will severely restrict the jurisdiction of administrative law judges who set fees for attorneys who appear before them. The constraints on legal fees suggested in that memorandum are unjustified and unwarranted. The new procedures developed under the memorandum will bottleneck fee petitions and make the possibility of reasonable and prompt compensation to attorneys impossible.

More importantly, however, it will be more difficult for disabled citizens to obtain private legal representation in Social Security matters. Statistics conclusively demonstrate that claimants represented by attorneys have a much higher chance of successfully concluding a claim. The March 31, 1987 policy change will only serve to discourage competent attorneys from taking Social Security cases.

*CERTIFIED AS A CIVIL TRIAL ADVOCATE BY THE NATIONAL BOARD OF TRIAL ADVOCACY

The January 1987 report of the Inspector General presumes, without any documentation, that attorneys' fees in excess of $75 per hour are unreasonable. Social Security stubbornly refuses to consider the economic reality faced by attorneys and clients who must have a contingency fee arrangement. Hourly rates are clearly inapplicable to Social Security litigation which is, by and large, handled on a contingency basis.

There was no evidence in the January 1987 Inspector General report to suggest widespread complaints from clients who felt over-charged by attorneys. In fact, there appears to be nothing to support such a conclusion. Nothing in the March 1987 memorandum or January 1987 IG report suggests that anyone has complained about attorney compensation. The IG report does confirm that 55% of the fee petitions studied in a selected sample showed fees of less than $75 per hour. 20% of the petitions were in the $75-$99 per hour range. This means that almost two-thirds of the petitions considered involved fees of less than $100 per hour. This is overwhelming evidence that attorneys handling contingency litigation are not being over-compensated. 56,694 fee petitions were processed by Social Security in 1986. The average fee authorized in 1986 was $1,573.99. This would seem to conclusively document that attorneys are not being over-compensated when they handle cases on a contingency basis.

The IG report and March 1987 memorandum are totally unrealistic in dealing with economic reality. Disabled unemployed claimants must obtain representation on a contingency fee basis. An attorney must receive adequate compensation to deal with the high price of operating a law office. Damage to the contingency fee arrangement will only result in countless thousands of Americans doing without legal services at a hearing. This would mean that fewer claims would be paid to deserving disabled citizens.

Social Security badly underestimates the degree of difficulty and skill required to competently handle Social Security disability claims. This is a highly technical area of the law, requiring considerable expertise. Legal services performed by experienced attorneys in Social Security claims are every bit as complex as those of any other highly specialized attorneys who work in other fields involving complex federal regulations. It should also be mentioned that relatively few attorneys are willing to handle Social Security claims because of the increased burden of proof imposed on the claimant and because of the growing complexity of obtaining fee authorization and payment. Regrettably, in recent years Social Security has not demonstrated a willingness to adhere to fundamental legal principles that are applicable in Social Security claims. It should also be mentioned that Social Security seems to require proof of disability beyond all conceivable doubt.

The report of the IG contains four or five selected examples which attempt to make a case against contingency fees and compensation being paid in a timely fashion to attorneys. Because of confidentiality, no one can truly investigate all of the circumstances surrounding the five or six illustrations provided in the IG report. Social Security is in a position to claim confidentiality concerning those claims while repeatedly using them as an illustration in favor of an attack on the contingency fee system. Interestingly, if the cases cited in the IG report were so simple, why was it possible for those claims to have been rejected at least twice prior to an administrative hearing? Did any of the people cited in the examples in the IG report complain to the administrative law judge about the amount of his or her legal fee? These are significant unanswered questions which should be further investigated.

I would also hope that your sub-committee would request a copy of the complete file of comments that were made in the fall of 1986 about the proposed August 12, 1986 regulations. I suspect that Social Security has not made that information available to you. Perhaps it might provide interesting information to your sub-committee for considering what is really motivating the Social Security Administration to develop this latest policy change. It would appear that the latest policy change is nothing more than an effort to do indirectly what Social Security knows that it will not be able to do if it publishes regulations in the Federal Register.

Thank you very much for entering this in the official minutes of your sub-committee record.

Very truly yours,

Barney O. Smith, Jr.
President-Elect
S.C. Trial Lawyers Association

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May 11, 1987

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Bldg.
Washington, D. C. 20515

Subject: Attorneys' Fees in SS disability cases

Dear Mr. Dowley:

Please find an original and six copies of my statement to be included in the record for consideration by the sub-committee.

I. It is totally unwarranted and unjustified to assume that any fee charged in excess of $75 an hour is unreasonable. Attorneys handling Social Security claims must necessarily represent disabled citizens on a contingency fee arrangement. The average disability client is totally incapable of hiring an attorney on an hourly basis. The Commissioner of Social Security will state that attorneys conducting business on a contingency basis is irrelevant for determining fees. The Commissioner will state that fees must be decided on a case-by-case basis. This utterly fails to deal with economic reality. It fails to give any consideration to the fact that clients must hire attorneys on a contingency basis. It is also the type of statement that one would expect from someone who is not an attorney and who fails to give consideration to the economic reality of having Social Security claimants as clients. It is, however, the type of thing that we would expect from someone who is designing a system to get lawyers out of the Social Security practice. By claiming to protect clients from excessive fees, the Secretary can accomplish a long sought after result--cutting the number of people who get disability benefits. If disabled citizens cannot hire lawyers, the Social Security Administration will not have to pay as many people benefits.

II. Statistical information maintained by Social Security confirms that fees are not unreasonable. The Office of Hearings and Appeals processed a total of 56,694 fee petitions in Social Security cases in 1986. 19,290 fewer petitions were filed in 1986 than in 1985. 75,984 petitions were processed during 1985. The average fee requested in 1986 was $1,774,89. The average fee authorized in 1986 was $1,573.99. Supplemental Security Income petitions should be considered separately. A total of 4,758 SSI fee petitions were processed during 1986. There were 1,861 fewer petitions in 1986 than in 1985 for consideration by Social Security. The average fee requested in an SSI claim was $1,147.75. The average fee approved was $1,041.19 in 1986 in an SSI claim.

This information comes from Social Security and confirms that attorneys are not grossly over-compensated for services rendered in disability applications. A total examination of all fee petitions will confirm that compensation paid to attorneys is not overwhelming. These statistics directly contradict the conclusion in the Inspector General's report which utilized a select sample of fee petitions.

III. On August 12, 1986, a notice of proposed rule making was published in the Federal Register by the Secretary of Health and Human Services. Social Security was attempting to centralize control of fee authorization within the Office of Disability Operations. This would have allowed centralized authorization of fees and would have created a significant delay in authorization and payment of fees. Unanimous written opposition to these proposed regulations occurred. Absent from her testimony was any comment from the Associate Commissioner about the overwhelming opposition to this proposal in August 1986. Hundreds of negative comments were made about the effort to centralize control of fee authorizations. Apparently Social Security did not expect overwhelming unanimous negative opposition to this effort to regulate attorneys out of the Social Security system.

Social Security abandoned the regulations and tried a different approach. Social Security officials found it still highly desirable to constrict the consideration of fee petitions and to obtain greater centralized control over the authorization process. Recognizing the danger of publishing anything in the Federal Register for comment, the Associate Commissioner has attempted to accomplish through a policy change what would have been impossible through appropriate regulatory enactment. Thousands of fee petitions have already been concentrated for consideration within nine regional chief administrative law judges' offices. Fee petitions which would have been considered by 692 administrative law judges are now concentrated in nine offices for consideration. Just imagine the delays that Social Security can create in considering these petitions. They have been given an extremely low priority. Additional paperwork has been generated for every office of Hearings and Appeals in the country. Havoc has been created for attorneys who try to be paid reasonable fees in a prompt and efficient manner.

IV. Social Security has experienced major frustrations in dealing with attorneys. Obviously, a significant reduction in the number of attorneys available to handle litigation will result in fewer awards of benefits. This can be the only reason that Social Security has persisted over the last 12 months in trying to gain tighter control over the authorization process. More delay and less money will guarantee the absence of attorney representation at a significant number of hearings.

V. According to the March 1987 memo, the report of the Inspector General is cited with propositions that attorneys are being overpaid. 45% of 2,000 sampled fee petitions reveal fees in excess of $75 per hour. This would mean that 55% of the fee petitions involve fees less than $75 per hour. The statistical study on page 3 of the memo also confirms 20% of the petitions in the $75 to $99 per hour range. This means that almost two-thirds of the petitions considered involved fees of less than $100 per hour. This hardly suggests that attorneys are being overwhelmingly compensated for work that has been done on a contingency basis. The Associate Commissioner must not be a lawyer and must know nothing about the economic reality of representing people on a contingency basis. It is incredible to attempt an application of hourly rates to litigation that is not being handled on an hourly rate basis. Most significantly, however, is the fact that her own report from the office of Inspector General shows tnat two-thirds of the fee petitions are being paid at the rate of $100 per hour or less.

The Secretary persists in a policy of determining fees without giving any consideration to the actual costs of providing legal services. Social Security will not think of considering what it costs to operate an office. Social Security gives no consideration to comparable rates for legal services in a community. Attorneys handling matters before other government agencies on a non-contingency basis would be compensated at a rate much higher than $100 per hour. Non-contingency fees charges for services before the Internal Revenue Service (tax attorney specialists) would greatly exceed $100 per hour. It is impossible for me to understand how a reasonable fee can be set when the Secretary states that she is not going to give any consideration to the costs of operating a law office.

VI. An attorney handling a case on a contingency basis receives no money from the client unless a favorable result is achieved. The average Social Security disability claimant has been out of work from 6 to 12 months and has absolutely no money to pay an attorney on an hourly basis. Contingency fee arrangements are the only mechanism that will afford competent attorneys to Social Security disability claimants. The attorney willing to risk his time to handle this litigation should not be penalized by the Social Security Administration when a favorable result is achieved. The attorney also risks his money when he advances funds for the purpose of developing a claim. The disability units frequently fail to request hospital records, fail to arrange for psychological evaluations, and there is a growing resistance within the hearing level of review to utilize medical advisors and vocational witnesses. Therefore, in many instances the client and the client's attorney must spend money to develop the case medically and vocationally.

VII. Neither the Inspector General nor Associate Commissioner Bradley are the least bit concerned about the thousands of cases handled by attorneys on a contingency basis which result in no fees or grossly inadequate fees. I have had a $3 fee approved in 1986. I have filed a fee petition for $2.25 for a case won at the hearing level of review in 1987. I have had numerous cases where no retroactive benefits were generated and no sum was available to pay even a minimum fee. There have been numerous cases where Social Security would refuse to withhold 25%, making no money available to the attorney. This is despite the fact that numerous written notices had been provided to Social Security to notify them that I represented the client. In many instances old overpayments are used to take all of the money that is withheld for the attorney's fee. Errors in computing benefits cause the fees to be recomputed a year after the benefit check has been received. The attorney must deal with countless payment problems for months after a fee is approved. Please see the attached exhibit.

VIII. Someone should ask the Associate Commissioner and Inspector General how many times Social Security failed to withhold the 25% and how many times did the attorney go unpaid over the last 36 months as the result of that willful failure to comply with the 25% withholding requirement.

IX. There were 56,694 fee petitions in 1986. Please ask the Associate Commissioner how many written complaints concerning fee petitions were received by Social Security. Noticeably absent from the report of the Inspector General is any survey of complaints received about fee petitions. Disabled citizens who hire attorneys must be happy with the fee arrangement. Where are the complaints? Most disabled citizens know the true value of having an attorney in dealing with a struggle to receive benefits from Social Security. Why didn't the Inspector General have information in his report about complaints from clients who are represented by attorneys? Probably the number of complaints would be negligible. It's odd that the "protected class" is entirely satisfied with the fee arrangement of 25% on a contingency basis. The Secretary's desire to further protect these disabled people from lawyers should be viewed with great suspicion considering the track record of the Social Security Administration in dealing with disabled citizens over the last 6 years.

CONCLUSION

The following recommendations are made to resolve the problem:

I. Create a presumption in favor of a 25% fee unless: (1) the claimant registers a written objection to the fee as being unreasonable; (2) the attorney and client agree to some other fee; (3) the fee is patently unreasonable considering the conduct of the attorney in rendering services; (4) the ALJ who conducted the hearing should always set the fee since he is in the best position to know the skill of the attorney and the quality of service rendered.

II. Immediately pass legislation to repeal the March 31, 1987 policy memo which creates no benefit for clients or attorneys and creates thousands of hours of additional paperwork for OHA and regional offices.

III. Ask the Associate Commissioner to make available to this committee copies of the hundreds of letters received in the fall of 1986 in opposition to the August 12, 1986 proposed regulations.

IV. Ask the Inspector General to confirm the validity of the dollar figures mentioned in this letter and ask the Inspector General to confirm the number of complaints received with regard to 56,694 fee petitions submitted in 1986. Are Social Security disability claimants really dissatisfied with their attorneys?

Thank you for your consideration of these comments.

Very truly yours,

George H. Thomason

Attachment

Exhibit A To May 11, 1987 Letter
of G. H. Thomason, Attorney

Illustrations of Delays in Disability Claims

1. SSN 239-80-8458. Favorable decision issued 10-29-86. Fee petition mailed 11-10-86. Authorization received 3-16-87. 25% had not been withheld by Social Security Administration. Attorney had been representing claimant for more than three years before United States District Court and Social Security Administration, but agency "inadvertently" failed to withhold the fee.

2. 251-30-4171. Favorable decision received 1-14-87. Payment information received 3-13-87. Fee petition 3-17-87. Authorization received 4-9-87. Social Security sent 25% withheld to client rather than attorney.

3. 249-88-7478. Favorable decision received 11-18-86. Fee information received Feb. 1987. Fee petition mailed 2-12-87 and authorized 3-19-87. Fee never received. Social Security failed to withhold 25%; therefore, no funds available to pay authorized fee.

4. 250-64-1598. Favorable decision received 6-10-86. Fee petition mailed 8-1-86. Authorization of fee 10-13-86. Fee never paid. Attorney's fee used to apply to overpayment.

5. 251-44-2445. Favorable decision received 1-18-87. Payment information received 2-11-87 and petition mailed to attorney fee officer 2-23-87. No authorization received and no fee paid.

6. 247-90-6288. Favorable hearing decision received 9-12-86 and payment information finally received on 2-2-87. Petition mailed 2-9-87. No authorization received and no fee paid.

7. 251-20-8577. Favorable hearing decision issued 1-6-87 and payment information received 2-13-87. Fee petition mailed 2-25-87. No authorization received and no fee paid.

8. 251-48-9104. Favorable hearing decision issued 10-10-86. Payment information received and fee petition mailed 11-11-86. No authorization received until 3-19-87. No fee paid.

9. 250-62-9651. Favorable hearing decision issued 11-19-86. Payment information received and petition mailed 2-25-87. No authorization received and no fee paid.

10. 250-64-0606. Favorable hearing decision received 1-12-87. Payment information received and petition mailed 1-27-87. No authorization received and no fee paid.

Exhibit A
Page 2

11. 251-36-2296. Favorable hearing decision issued 1-15-87. Payment information received 2-27-87. Fee petition mailed to OHA 3-2-87. No authorization received and no fee paid.

12. 248-23-2298. Favorable hearing decision received Aug. 1986 and payment information received 9-4-86. Fee petition mailed 9-4-86. No authorization received and no fee paid.

13. 251-42-4935. Favorable hearing decision received 1-24-86. Payment information received 6-12-86 and petition mailed 6-12-86. Authorization never received and no fee paid. Duplicate copies of the petition have been provided six months ago and nothing has happened on duplicate copies.

May 13, 1987

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102, Longworth House Office Bldg.
Washington, D. C. 20515

Subject: Attorneys' Fees

Dear Mr. Dowley:

I have just recently been certified for Social Security disability payments. I understand that the Social Security Administration is making it more difficult for attorneys to receive prompt authorization of fees. I cannot understand why the Social Security Administration is permitted to interfere with contractual arrangements between a client and his attorney. I agreed to pay my attorney only if a favorable result was achieved. It is extremely difficult dealing with the Social Security Administration and the average American citizen must have an attorney to assist in dealing with Social Security. My attorney has performed an excellent service for me. I hope that your sub-committee will make it much easier for an attorney to receive 25% of the past due benefits. That was the original contractual agreement and it is unfair for Social Security to interfere with that agreement later on after the case has been won.

I understand that Ms. Eileen Bradley, Associate Commissioner, has recently set up a policy change which will make it much harder for lawyers to receive adequate compensation. I understand that the new policy gives no consideration to the fact that attorneys handle these cases on a contingency basis and these attorneys frequently advance money to help document the claims. Social Security requires so much medical and vocational documentation of claims that it would be hard for an average citizen to undertake his own representation at a hearing. I hope that your sub-committee will reverse the actions of the Associate Commissioner and will change this unreasonable and unnecessary policy. There is nothing wrong with the existing system of a 25% fee. I can only believe that any effort to make it more difficult to obtain a fee is an effort by Social Security to make it more difficult for disabled people to receive legal help. It is important to have an attorney in dealing with Social Security. Please don't let Social Security make changes that will make this process more difficult. Relatively few lawyers are willing to handle these cases because of the difficulty that currently exists in being paid.

Thank you for entering these comments in the official record of the sub-committee.

Very truly yours,

Dennis H. Varner

Dennis H. Varner
Box 358
Drayton, S. C. 29333

COMMITTEE ON
RECEIVED
JUN - 2 1987
WAYS AND MEANS

Mr. Joseph K. Dowley
Chief Counsel
Committee on Ways and Means
U. S. House of Representatives
Room 1102
Longworth House Office Building
Washington, D. C. 20515

Subject: Attorneys' Fees/Social Security Disability Cases

Dear Mr. Dowley:

I enclose an original and six copies of my statement for consideration by your sub-committee. I am an American citizen who is disabled and I have a claim with the Social Security Administration for disability.

It is extremely difficult to obtain Social Security disability benefits. It is a highly technical legal area and the average citizen in this country needs legal representation. I wish to oppose efforts of the Social Security Administration to restrict attorneys' fees. Very few attorneys are willing to handle Social Security cases. The latest effort of the Associate Commissioner to make it more difficult for attorneys to receive compensation will reduce the number of attorneys available to people like me. I do not believe that Social Security has the best interests of disabled citizens in mind when they propose things that will make it more difficult for claimants to have lawyers. Disabled citizens need lawyers and it should be easier for a lawyer to be paid his fee and to have it authorized.

The only way that a disabled citizen can hire a lawyer is on a contingency basis. After all, disabled citizens have no income and do not have resources to hire a lawyer on an hourly basis. Frequently lawyers must advance money to document these claims. Social Security should have nothing to do with saying whether a contingency fee is reasonable or not reasonable. Social Security should not be permitted to interfere with the contractual arrangement between a client and attorney. I hope that your sub-committee will do something to put a stop to the latest effort of Social Security to make it harder for lawyers to handle these cases and harder for lawyers to be paid.

Thank you very much for considering these comments.

Very truly yours,

William E. Waters

Statement for the Oversight Hearing by the Social Security Subcommittee of the House Ways and Means Committee on the Subject of Social Security Administration Regulation of Attorney's Fees (May 13, 1987)

Unless Congress intervenes very soon, a misguided Social Security bureaucracy is going to make it impossible for disabled people to obtain capable attorney representation in Social Security disability cases.

Social Security disability cases account for only ten percent of my law firm's revenues. By no stretch of the imagination have these cases ever been lucrative for us to handle. We have continued to accept them because there are so many good people -- workers with excellent employment records and unquestionably severe medical conditions -- who are being treated unjustly, and so few capable attorneys in this area who are willing to help them. Other members of the bar, local service organizations and some federal judges have commended us for performing a "public service."

Currently, I represent about two-thirds of the entire Social Security disability case load pending in the Dallas federal courts. As the Social Security Regulations become more and more complex, we have had an increasing demand for legal representation in Social Security cases. Yet, we have cut back on the Social Security cases we will accept, and are seriously considering turning all new Social Security cases away, because it is impossible to know if, or when, the Social Security Administration will allow our clients to pay us reasonable fees for our work.

During the past year, we have experienced what can only be described as ever-increasing bureaucratic harrassment by the Social Security Administration in its regulation of our attorney's fees. The handwriting is on the wall. Unless something is done now, the Social Security claimant's right to legal representation will be reduced to a hollow joke.

In this statement, I will address the following specific issues: 1) The premise behind the Social Security Administration's latest initiative to reduce attorney's fees -- that claimants are being overcharged for legal services in Social Security cases -- is unsound; 2) The SSA Inspector General's report does not support the agency's current repressive approach toward attorney's fees, because the IG report is also based upon fundamentally unsound presumptions; 3) Current law -- or at least SSA's interpretation of current law -- results in a bureaucratic process that is unduly expensive and produces decisions that are frequently absurd; and 4) Congress should amend the law to establish an automatic 25% fee in most cases.

1. The premise behind the Social Security Administration's latest initiative to reduce attorney's fees -- that claimants are being overcharged for legal services in Social Security cases -- is unsound.

SSA's own statistics rebut the notion that attorney's fees are high in Social Security cases. According to the much cited Inspector General's report, "Fees overall during calendar year 1984 appear reasonable, averaging $71 per hour of work as claimed by attorneys on the fee petitions . . . our analysis showed that . . . 55% of the fees approved by ALJs were below an equivalent rate of $75 per hour, . . . 20% were in the $75-$99 range, 21% were in the $100-$199 range, 3% in the $200-$299 range and 1% over $300 an hour." (Inspector General's report, p.6).

The $71 per hour average fee in Social Security cases is well below the prevailing market rates for comparable attorney's services in most areas of the country. According to Mr. Fred Misko, Jr., a recognized expert on attorney's fees, who has lectured and written widely on the subject for the State Bar of Texas, the minimum reasonable attorney's fees for the type of services provided in Social Security disability cases, on a contingent fee basis, in the Dallas area is $125-$150 per hour. (Attachment A)[1]. Mr. Misko's deposition was taken in a case brought against the Social Security Administration under the Equal Access to Justice Act, in which the agency did not even challenge this fact.

Also attached under Tab A is an itemized summary of the monthly overhead expenses of my law firm which are attributable solely to our handling of Social Security cases. Our overhead expenses, before we receive any profit or salary for our work in Social Security cases, amounts to approximately $79 per hour. According to Mr. Misko, these overhead expenses are about average for attorneys in Dallas, Texas. Thus, the national average of $71 per hour is actually less than the average overhead expense for operating a law office in Dallas.

Another measure of the fact that attorneys are not overpaid in these cases is that so few attorneys are willing to accept them. The Southwestern Bell Yellow Pages for the greater Dallas area (October '86-'87) contains over thirty pages of display ads placed by dozens of attorneys seeking every conceivable type of legal business. My firm is the only one in the entire Dallas Yellow Pages that still advertises for Social Security cases.

The affidavits of eighteen Dallas attorneys, who once accepted at least an occasional Social Security case, but who no longer do so, are attached to this statement at Tab B. The overwhelming sentiment of these lawyers is that Social Security cases are simply not economical for them to handle because the fees are too small for the amount of work required.

Also attached to this statement, at Tab C, are the affidavits of two of my clients, detailing the difficulties they had in finding an attorney who had any experience in the field of Social Security law, and was willing to accept their cases. Just last week, I was contacted by a claimant, Ms. Edna Titus, who asked me to take over her Social Security case. She brought with her a letter from another lawyer, Mr. David Line, who had been representing her. The letter (included at Tab C) states that "Mr. Line is not interested in fighting the government any longer and so I am in the process of returning to all of my Social Security clients their files."

According to SSA statistics, a claimant who is represented by an attorney at his administrative hearing is roughly twice as likely to win his case as one who is unrepresented; yet only 50% of all claimants have attorney representation. (Another 14% have non-attorney representatives). If attorneys were reaping windfall profits from their work in Social Security cases, or even if fees in Social Security cases were commensurate with the prevailing market rates for other types of legal services, many more attorneys would be actively seeking out these cases, rather than avoiding them, and it would not be so difficult for claimants to find attorneys in many areas of the country, as is now the case.

SSA Associate Commissioner Eileen Bradley has suggested that the reason claimants represented by attorneys do so much better in their hearings may be attributable to attorneys screening out difficult cases. To the contrary, I believe there is a vast number of claimants who would hire an attorney, if they could simply find one who was knowledgeable in the Social Security field, and would accept their case on a 25% contingent fee basis.

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1. Attachments referred to herein as Tab A, Tab B, etc.; refer to material submitted by me which is on file with the Committee.

2. The SSA Inspector General's report does not support the agency's current repressive approach towara attorney's fees, because the IG report is also based upon fundamentally unsound presumptions.

The SSA Inspector General's report contains the following glaring errors:

a) It simply presumes, without any documentation, that attorney's fees in excess of $75 per hour are per se unreasonable. Because, as I have previously discussed, attorneys' overhead expenses in major metropolitan areas routinely exceed the $75 per hour figure, and because prevailing market rates for similar kinds of legal services, furnished on a contingent fee basis, are routinely in excess of $150 per hour, this presumption is ludicrous. The Inspector General's data -- showing the average fee is $71 per hour and that 75% of all fees are less than $100 per hour -- does explain, however, why so few attorneys are willing to accept these cases in many areas of the country;

b) The $75 per hour "limit" on attorney's fees in the Equal Access to Justice Act is not analagous. The EAJA does not place any limit on the amount of money an attorney may charge his client for services performed in any legal matter. Rather, it merely limits the amount a small business or individual, who is aggrieved by totally unreasonable governmental actions, can recoup from the government to reimburse him for his attorney's fees;

c) The IG's report is unrealistic in failing to take into account the practical necessity that claimants obtain representation on a contingent fee basis. Even if it were reasonable to generally limit attorney's fees, in Social Security cases, to $75 per hour (which it clearly is not), it would still be necessary to factor in the value received by a claimant who obtains legal services on a contingent fee basis. In Social Security cases, the financial circumstances of most claimants preclude their obtaining legal services under anything but a contingent fee arrangement. Even if they could afford it, most claimants in this situation, given a choice, would prefer to pay a somewhat higher hourly rate, assuming the fee is conditioned on a successful result, than a standard fee that is not conditioned on result;

d) The IG's report badly underestimates the degree of difficuly and skill required to competently handle "routine" Social Security disability cases. The U.S. Supreme Court recently characterized the regulations governing eligibility for Social Security Disability benefits as "highly complex." Bowen v. City of New York, 103 S.Ct. 2022, 2024 (1986). In addition to the complexity of the regulations, there is the complexity of the medical issues, the complexity inherent in relating medical evidence to the legal standards, and the complexity of the vocational issues. Approximately 35% of cases at the ALJ level require a representative to cross-examine expert witnesses who are called to testify by the administrative judge. The cross-examination of medical doctors and vocational experts is about as demanding as any legal work that exists. The legal services performed by an experienced, diligent attorney in a Social Security disability case are every bit as complex as those of other highly specialized attorneys who work in fields which involve complex government regulations. (Please refer to the affidavit from Ms. Ellen Smith Pryor, a professor of law at the SMU Law School, included under Tab B).; and

e) The IG fails to mention any statistics on the number of claimants who complain, at any level of the attorney fee regulatory process, that the fee awarded their lawyer is too high. Perhaps the Inspector General thinks that Social Security disability claimants are too ignorant or inexperienced to know that they are being overcharged. I suspect that the IG at least looked for some evidence that claimants are dissatisfied with the attorney's fees they are paying, and the fact that such complaints are extremely rare was conveniently omitted from the report. The simple truth is that the standard 25% contingent fee arrangement works in the Social Security disability area.

3. Current law -- or at least SSA's interpretation of current law -- results in a bureaucratic process that is unduly expensive and produces decisions that are frequently absurd.

SSA insists that current law requires it to crank up its complex regulatory machinery in every single attorney fee application, regardless of whether or not there is any dispute between the parties who are directly involved, and regardless of whether or not the fee the parties have agreed to is reasonable on its face. Hundreds of thousands of dollars could be saved if Congress simply instructed the Social Security Administration to only apply its complicated regulatory procedures in cases where the attorney wants to charge more than 25% of the retroactive benefits, or the attorney or client complains that the 25% figure is unreasonable.

SSA is even taking the absurd position that current law requires it to perform exactly the same review in cases where the party paying the attorney's fee is a major insurance company, rather than the claimant. Attached to this statement, under Tab D, is correspondence between my office, SSA and Northwestern Mutual Life Insurance Co., in the case of Vicki Von Der Ahe. The insurance company informed SSA that it was paying my entire fee, and requested that a fee in the amount of $2,773.00 ($142 per hour) be approved. SSA responded that the insurance company's payment of the fee was irrelevant, and fixed the fee at $2,000 ($102 per hour). If all of the costs are taken into account, SSA probably spent more than $773.00, the amount in controversy, to "protect" Northwestern Mutual Insurance Company from paying me a fee that we both agreed was perfectly reasonable for my work. Is this the kind of business the federal government ought to be about?

4. Congress should amend the law to establish an automatic 25% fee in most cases.

The problem with the current law, which merely calls for the approval of "reasonable" fees, is that SSA has too much discretion. SSA has translated this discretion into a burdensome predicament for everyone involved, including itself.

A provision for automatic approval of contingent fees of 25% of the retroactive benefits awarded, except in cases where either the attorney or claimant complains that the 25% figure is unreasonable, is the only system that makes sense. The SSA Inspector General's report indicates that this would result in an average fee of less than $75 per hour, which is actually below the prevailing market rate for most lawyers' services in most parts of the country. This system compares favorably to contingent fees in worker's compensation cases (25%) and personal injury cases (33-40%). Such a fee system allows claimants a reasonable opportunity to obtain capable legal representation, as opposed to the current system which erects artificial barriers that chase out the most capable practitioners. Such a system also eliminates any temptation that political appointees to SSA might entertain, to try to reduce the size of the Social Security disability program in a backdoor way, by effectively denying claimants the opportunity to obtain capable attorneys to handle their claims.

Respectfully submitted,

Carl Weisbrod
WEISBROD & WEISBROD, P.C.
Meadow Park Central #V-470
10300 N. Central Ewy.
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214/373-3761

[ATTACHMENTS ARE BEING RETAINED IN COMMITTEE FILES.]

C.W. BILL YOUNG
8TH DISTRICT, FLORIDA

MEMBER
COMMITTEE ON
APPROPRIATIONS

SUBCOMMITTEE ON
NATIONAL DEFENSE

Congress of the United States
House of Representatives
Washington, DC 20515

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May 26, 1987

Honorable Andy Jacobs, Jr.
Chairman
Subcommittee on Social Security
Committee on Ways and Means
1102 Longworth H.O.B.
Washington, D.C. 20515

Dear ~~Chairman Jacobs~~ Andy:

On May 13, 1987, your Ways and Means Subcommittee on Social Security held a hearing concerning attorneys' fees in social security disability cases.

I was recently contacted by my constituent, Janet D. Herron, an attorney who specializes in social security cases, expressing concern about fee controls adopted by the Social Security Administration (SSA). In an effort to be of all possible assistance, I am enclosing six copies of her written statement, which I hope will be of some help as you and members of the Subcommittee continue to review this policy change.

Thank you for your assistance in this matter, and with best wishes and personal regards, I am

Very truly yours,

C. W. Bill Young
Member of Congress

CWY:pag

Enclosures (6)

JANET D. HERRON
Law Office of Janet D. Herron
9700 Koger Boulevard, Suite 209
St. Petersburg, FL 33702
(813) 579-9190

I am an attorney who practices exclusively in the area of Social Security Law. I have been dealing exclusively with Social Security claims since July of 1980 when I became an attorney advisor for the Tampa Office of Hearings and Appeals of the Social Security Administration. Since November of 1983 I have been in private practice. I have represented over 1,000 claimants before the Social Security Administration. My fees have ranged from 0 to $18,000.00. I also handle a number of Federal Court appeals. I have been awarded attorney's fees under the Equal Access to Justice Act. I am making the following statement on my own behalf as well as on behalf of my clients.

Since November of 1983 five (5) experienced attorneys who had handled Social Security cases in the past have decided to give up this area of practice because of the problems in receiving adequate compensation for work performed before the Social Security Administration. Each of these attorneys now refer all of his Social Security clients to me. On March 31st, 1987, when the Social Security Administration announced it's new policy in regard to attorney's fees, I seriously considered withdrawing from this area of practice. With the encouragement of the administrative law judges before whom I appear, other attorneys in the area who refer business to me, and my clients, I have decided to continue in this area of practice for the present time until a final determination is made in regard to the attorney fee question.

The purpose of the attorney fee provisions in the Social Security Act as enacted by Congress was to ensure that claimants who chose to be represented would have access to qualified representatives, including attorneys; to ensure that any such representation is procured at a fair price in light of the need to protect the claimant's economic security interests; and to ensure, in the case of attorney representation in Title II proceedings a source of compensation for services performed.

In the recent past the Social Security Administration has proposed various changes in the attorney fee provisions that appear to be aimed at discouraging claimants from being represented by attorneys.

The Social Security Administration's own statistics show that the average fee authorized in 1986 was in the amount of $1,573.99 for Title II disability claims and $1,041.79 for Supplemental Security Income cases. The Inspector General's analysis of the sample of 2,000 fee petitions showed that 55% were at a rate of less than $75.00 per hour, 20% at the rate of $75.00 to $99.00 per hour, 21% at the rate of $100.00 to $199.00 per hour, and 3% at the rate of $200.00 to $299.00 per hour and 1% exceeding $300.00 per hour. The example cited of $750.00 an hour was of a single case.

Under the procedure established by the Social Security regulations the claimant is provided with a copy of the fee requested and has an opportunity to object to the amount being requested before it is approved. Once the fee has been approved the claimant is given another opportunity to file any objections before the funds are released to the claimant's attorney.

Since 1979, the "ceiling" for ALJ's authority has been set at $3,000.00. The recent reduction of this authority to $1,500.00 and to $75.00 an hour places an unreasonable restraint upon attorneys practicing in this specialty area. Social Security Administration's figures show that the average fee authorized in 1986 in Title II claims was in the amount of $1,573.99. The change will mean that the majority of fees will have to be referred to the Regional Chief Judge's office for final approval.

The administrative law judge must then submit that a justification memorandum each time he approves a fee in excess of $1,500.00 or in excess of $75.00 per hour. The already overworked Office of Hearings and Appeals will grind to a standstill with the additional requirement of preparing these justification memorandums.

After representing a claimant successfully at a hearing there is a 3 month delay before a written decision is received. There is an additional 2 to 3 month delay before the claimant receives any funds. If any errors are made in the calculation of these funds it takes an additional 2 to 3 months to have this resolved. At that point a fee petition can finally be submitted. I have waited for 6 months or longer to have a simple routine fee petition approved at the Office of Hearings and Appeals. After the fee is approved the monies are not released for an additional 2 to 3 months and sometimes longer. The added delay of having fees referred to the Regional Chief Judge's office before final approval will cause an additional delay of at least six months. At the present time any fee approvals that are appealed to the Regional Chief Judge's office are taking as long as 9 to 12 months for final approval.

At the time a fee is approved by an administrative law judge he does not have the actual file upon which the attorney's fee petition is based in front of him. He at least has a recollection of the work performed by the attorney in the case and a recollection of the attorney's performance at the hearing. Once the fee petition is referred to the Regional Office there is no documentation from the claimant's file to weigh the value of the attorney's work and no familiarity with the issues involved in the case.

It is ludicrous to require that all representatives be paid no more than $75.00 an hour. Those of us who belong to the National Organization of Social Security Claimants Representatives and attend annual seminars to keep abreast of all the changes in the law in this field develop a much greater expertise than the average practitioner. The practice of Social Security Law has become increasingly complex with the passage of time. Attorneys in other areas in which fees are on a contingent basis regularly receive more than a 25% of the amount of benefits obtained. Most clients would be unable to obtain representation if the attorney's fee was not paid out of their past-due benefits. Attorney's who specialize in the area of Social Security Law must wait for a period in excess of one year to receive their fees. If all fees over $1,500.00 must be appealed to the Regional Office and delayed an additional 6 months it becomes impractical to continue practicing in this area.

I have personally witnessed a drastic increase in the number of claimants who are seeking attorney representation. There simply are not enough attorneys in this geographic area who are willing to handle Social Security cases to allow adequate representation for those claimants seeking representation. The current policy in effect will further reduce the availability of counsel.

If the Social Security Administration would follow the Regulations and award claimants disability benefits without forcing claimants to go through 3 levels of appeal and attend a hearing it would not be necessary for claimants to hire attorneys to help them in obtaining the benefits to which they are entitled. In the average case that I handle the claimant waits for a period of 15 months or more from the time they file their application until their application is approved.

The Social Security Administration is enforcing it's new policy on fee petitions that have been pending before the Administration since November of 1986 for work performed prior to November of 1985 involving claimants who entered into contracts with their attorney in 1984. If such a policy of reducing fees to a maximum of $75.00 an hour and a cap of $1,500.00 is put into effect it is unconscionable to have this applied retroactively to cases in which the contract was signed and the work was completed prior to the policy change.

The present policy of the Social Security Administration must be changed if claimants are to continue to have access to competent counsel.

Respectfully submitted,

Janet D. Herron,
Attorney at Law

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